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DEPARTMENT OF INDUSTRIAL RELATIONS
INDUSTRIAL WELFARE COMMISSION

Public Hearing

May 26, 2000
State capitol, Room 4292
Sacramento, California

P A R T I C I P A N T S

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Industrial Welfare Commission

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1 P R O C E E D I N G S

2 --o0o--

3 (Time noted: 10:20 a.m.)

4 COMMISSIONER DOMBROWSKI: All right. Let's get
5 started here. Call the meeting to order. Industrial
6 Welfare Commission, May 26.

7 If I could have a call of the roll.

8 MR. BARON: Bosco.

9 COMMISSIONER BOSCO: Here.

10 MR. BARON: Broad.

11 COMMISSIONER BROAD: Here.

12 MR. BARON: Coleman.

13 COMMISSIONER COLEMAN: Here.

14 MR. BARON: Dombrowski.

15 COMMISSIONER DOMBROWSKI: Here.

16 MR. BARON: And let the record show that Harold
17 Rose is not here.

18 COMMISSIONER DOMBROWSKI: First item on the
19 agenda is consideration of and public comment on the
20 proposed amendments to Wage Orders -- oh, I'm sorry --
21 approval of the minutes. I'm jumping ahead of myself.

22 That was distributed in your packets. Can I
23 have a motion?

24 COMMISSIONER BROAD: So moved.

1 COMMISSIONER COLEMAN: Second.

2 COMMISSIONER DOMBROWSKI: All in favor, say
3 "aye."

4 (Chorus of "ayes")

5 COMMISSIONER DOMBROWSKI: Okay. The first item
6 on the agenda is proposed amendments to Wage Orders 1
7 through 13. We have two proposals, one which was
8 circulated by Commissioner Broad, and a second, which has
9 been worked on, that was included in your packets with
10 some proposals from the industry. What I would like to
11 propose is that we bring up selected members on both
12 sides to testify and walk us through what they -- what
13 they see on these things.

14 So if I could get both labor -- and I'm looking
15 to Mr. Rankin for his assistance on this -- they just
16 received it, unfortunately, the other -- the alternative
17 language, besides Barry's. Have you seen that or not,
18 Tom?

19 MR. RANKIN: (Not using microphone) We just
20 received the language --

21 COMMISSIONER DOMBROWSKI: Okay.

22 MR. RANKIN: (Not using microphone) -- for Wage
23 Order 4. My understanding is the first item on the
24 agenda deals with election procedures for other wage

1 orders than 4 and 5. We don't have a proposal on that.

2 COMMISSIONER BROAD: Mr. Chairman? Mr.
3 Chairman, I believe that this proposal, which was just
4 distributed, in part deals with alternative workweek and
5 election issues, but it deals with a whole number of
6 other issues that are not on the agenda, haven't been
7 noticed to the public, and I don't think are
8 appropriately considered at this hearing.

9 COMMISSIONER DOMBROWSKI: You're talking about -
10 -

11 COMMISSIONER BROAD: That's right.

12 COMMISSIONER DOMBROWSKI: -- this? That Andy
13 distributed?

14 COMMISSIONER BROAD: What?

15 COMMISSIONER DOMBROWSKI: This is what Andy
16 distributed.

17 COMMISSIONER BROAD: Oh. Yeah. Oh, okay. I
18 thought you were talking about the one from --

19 COMMISSIONER DOMBROWSKI: No.

20 COMMISSIONER BROAD: Oh, okay. All right. I
21 understand. What -- right, what Andy distributed. Okay.
22 I understand.

23 COMMISSIONER DOMBROWSKI: You got that? Does
24 that make sense?

1 It's going to be a hectic day, folks.

2 COMMISSIONER BROAD: Okay.

3 COMMISSIONER DOMBROWSKI: Okay?

4 I would like to get the healthcare -- healthcare
5 representatives to come forward, and I would like to see
6 if -- why don't I just bring them up first, and we'll
7 walk through this one, and then we'll come to the second
8 one after we go through theirs? Is that all right with
9 everybody?

10 We'll go through this one first, the one that
11 Andy just distributed --

12 COMMISSIONER BROAD: Okay.

13 COMMISSIONER DOMBROWSKI: -- with their
14 proposals, let them talk --

15 COMMISSIONER BROAD: Okay.

16 COMMISSIONER DOMBROWSKI: -- then we'll bring up
17 the other panel.

18 MR. MADDY: Good morning, Mr. Chairman.

19 COMMISSIONER DOMBROWSKI: Let me just clarify,
20 for the commissioners, the document you have is a
21 document that I had prepared internally with some
22 options. And then, what you see underlined are the
23 amendments proposed by the healthcare industry to this
24 document.

1 Okay?

2 MR. MADDY: Mr. Chairman, Commission members,
3 staff, my name's Don Maddy. I work for George Steffes,
4 Incorporated, and I represent the California Healthcare
5 Association, CHA, which represents about 450
6 organizations in California's hospitals and large
7 physician group organizations.

8 We have gone over Mr. Broad's proposal, spent a
9 lot of time in the -- with the industry representatives
10 trying to estimate and understand the impacts Mr. Broad's
11 proposal would have in hospitals and other healthcare
12 environments. We do not agree with a number of different
13 proposals that have been forwarded by Mr. Broad, so we
14 thought it best that we would come up with some
15 alternative proposals that are on the same track and the
16 same subject matter, but that offer different solutions.
17 Generally our solutions are ones that are very similar,
18 if not identical, in many cases, to the 1993 wage orders.
19 Prior to 1998, wage orders were adopted that -- that were
20 specifically designed to assist with unique circumstances
21 that are involved in the healthcare industry, unique
22 circumstances that are involved with dealing with
23 employee issues in a healthcare environment, where
24 patients are a priority that need to be cared for.

1 There have been prior commissioners that have
2 sat in your chairs that have had to make some decisions
3 about healthcare employees and healthcare environments
4 that span many years. 1993 was an amendment to a 1989
5 provisions, which, a good part of the '80's, there was
6 also a number of provisions -- so there's a long history
7 here of -- of different treatment, in effect, for the
8 healthcare workplace that's not -- that has not been
9 offered to other employees. So we're trying as best we
10 can to deal with new ideas that are coming, like those
11 that are presented by Commissioner Broad, and trying to
12 deal with those in the context of what we've been doing
13 for a number of years, which is following the 1993
14 orders.

15 Our understanding of AB 60 implementation is --
16 is that there's a number of things that need to be done
17 that are different in the '93 orders. I think, for the
18 most part -- and I would say we've covered most of those
19 issues in proposals that we've offered -- we've tried to
20 -- we've had some interpretation differences, maybe, with
21 some others about exactly what AB 60 was doing in a
22 couple of cases, but for the most part, we've taken the
23 AB 60 language and incorporated it into wage order
24 language from 1993. And that's a result of a number of

1 our proposals. There are a few exceptions to that, but
2 we believe, for the most part, '93 orders with AB 60
3 implementation should be the direction of the Commission,
4 because it's worked for a number of years. There's a few
5 -- there's a few items that may be able to be improved,
6 but for the most part, it's worked for -- for the
7 industry. And we would hope that you would adopt
8 proposals that are more akin to what we've prepared for
9 today.

10 First of all, in the -- in the document that was
11 passed out that says Chairman Dombrowski's -- Chairman
12 Dombrowski's amendments, there's a couple of items of
13 concern that we even in this document, which I'll point
14 out, but for the most part, this changes the '93 orders
15 by redefining who the healthcare industry is, so that
16 there's a better definition. There was a -- basically,
17 it just said "healthcare industry" in the '93 orders.
18 There's been a desire to define that more narrowly, and
19 we've offered something that defines it more narrowly.

20 There was also -- there has also been a request
21 on the part of labor -- and I won't speak for them -- as
22 to what the -- what the background is on -- on their
23 initiative, but it was basically contained in Mr. Broad's
24 initiative -- was that only voluntary overtime was

1 allowed after a 12-hour shift. So there's no employer
2 input into whether employees should work past 12 hours;
3 it was up to the employee. We -- we have tried to
4 structure some modifications which address some of our
5 concerns. That's Item (J).

6 And we still don't -- we still don't agree that
7 this should be a provision of this Commission, but we
8 tried to address all the different concerns that we had
9 with that provision. And I'll -- I can get into that in
10 a moment, as to what our concerns were. We don't agree
11 with it, but we know that there's -- that there's been a
12 lot of discussion that it should be a voluntary overtime
13 instead of mandatory.

14 Also, we had some language changes that had to
15 do with reimplementing base period wages. There were
16 some changes made by some healthcare organizations, even
17 though the Healthcare Association urged members not to do
18 that -- we sent a letter in October saying, "Do not
19 reduce pay and then go to an overtime structure, just
20 wait till the outcome of this Commission so that we can
21 try to keep our shifts in place," but some healthcare
22 organizations may have reduced their base pay so that
23 they could have a base pay and overtime-adjusted wage.
24 If anyone in the healthcare industry goes back to 12-hour

1 shifts, then they need to re-establish that base pay to
2 what it was before they dropped it, so that no one loses
3 anything throughout -- through the AB 60, when it deals
4 with 12-hour shifts.

5 In addition to that, we have gone back to 1993
6 wage orders on nearly everything, and we have a couple of
7 -- of differences. For the most part, we think that the
8 gains made by AB 60 that are in this document are -- are
9 things that we can live with. They are not -- there is
10 nothing, really, in these two sections that differ that
11 much from -- from the '93 orders that were in AB 60.

12 I'd like to just make a couple of comments. One
13 is on alternative workweeks, Section (A). We talked to
14 Mr. Baron about this a bit.

15 There's a -- there's a sentence in here that
16 refers to additional payments if the regularly scheduled
17 workdays were not adhered to. Mr. Baron has pointed out
18 that in the elections procedures, if you elect to have so
19 many days per week worked and so many hours per day
20 worked, that you shouldn't run into a problem with
21 switching days during the week. But in the case -- if
22 you don't do that, if you set up a schedule that says
23 very specifically who will work when, and you may rotate
24 those schedules or have different menu options, that you

1 could be subject to having to pay time and a half for the
2 25th hour worked during a week.

3 There's a simple solution to this, is to be
4 consistent with what's in the election procedures by
5 amending this alternative workweek section to say that --
6 that, "All worked performed in excess of 12 hours per day
7 and any worked in excess of 8 hours on those days worked
8 beyond the regularly scheduled number of workdays" --
9 instead of just "workdays" -- "number of workdays
10 established by the alternative workweek agreement shall
11 be paid at double the employee's regular rate of pay."
12 And what that basically does is avoid any confusion that
13 the number of workdays is what's being ceded. So you
14 will be paid extra pay after 36 hours, but you wouldn't
15 be paid it after 24 hours if you had a day switch, let's
16 say. So it's the number of days. And that's consistent
17 with the elections procedures allowing you to -- to
18 modify your schedule -- excuse me -- to modify your
19 schedule based on either -- on the number of days. But
20 there could be schedules that people set up that say, you
21 know, this group of people is going to work Mondays,
22 Wednesdays, and Fridays, this group Tuesday, Thursday,
23 Saturday. It could be that way, and very specifically
24 set up for the days. And we don't want to have people

1 that set their days and those that don't be treated
2 differently and have a premium pay structure that's
3 different. So we would -- we would appreciate an
4 amendment there.

5 Outside of that, we'd prefer that you adopt the
6 longer -- the longer healthcare industry definition.
7 There's a number of other folks here, a number of people
8 in the industry worked in a lot of different healthcare
9 environments to try to come up with this definition.
10 This is a -- this is a unified group of people that have
11 attempted to craft something. There's other testimony
12 here that will address that, and there's a couple of
13 people right here that can address that a little better
14 with respect to residential care and doctor office and
15 some other facilities that may have healthcare activities
16 going on. But we think the definition should be broader
17 so that units can work together in hospitals and that --
18 and that people who typically deal with patients, where
19 it's difficult to just jump off a shift and -- and --
20 that they should also get 12-hour.

21 In addition to that is when we go to the
22 mandatory -- the no mandatory overtime provision --
23 that's (J) -- our biggest problem with -- with not
24 allowing an employer to have an employee stay is not --

1 is not a rule, it's not the rule. And we've heard
2 examples of exceptions where employers abuse their --
3 they abuse their authority to have someone stay beyond
4 hours. And after 12 hours -- actually, for me it's not
5 12 hours every day, but, you know, as soon as I'm ready
6 to go home, I want to go home -- I don't -- I don't think
7 that's something that -- that we really object to, but
8 there's -- but find there are circumstances that -- on
9 the other hand, there are circumstances where a patient
10 needs care, there's an employee that's late for work and
11 an employee -- and another employee may have to stay to
12 have the patient be cared for. We think this is a lot
13 different in the healthcare environment than it may be in
14 other environments where there -- where there may not be
15 any type of jeopardy.

16 But for the most part, we're not worried about -
17 - we're not worried about nearly all of the people that
18 are in positions of working a 12-hour shift. Almost all
19 people that are in this position would act responsibly.
20 And if there was truly a need to stay and it was
21 expressed that there was a need to stay because of
22 patient care, they'd stay. We're not -- we're not
23 doubting that. But it only takes one time when the
24 hospital doesn't have enough people on staff because

1 people could walk out the door who -- who, for whatever
2 reason -- and it could be one person -- I mean, I've
3 always -- as long as I've been around, no matter -- it's
4 not a perfect world -- there are people that, at one time
5 or another, may decide they don't want to stay. And they
6 -- the -- there's still going to be a problem that's
7 created by that.

8 So we try to have some sense of that. We try to
9 reach agreement. We met with labor. We talked a little
10 bit about this problem. I don't -- I don't think anybody
11 doesn't recognize there's a problem; I just think we're
12 trying to figure out what the solution would be. So I
13 don't think it's an easy solution to just say that, no
14 matter what, you can walk out.

15 So we need to -- we need to address that. We --
16 we offered some language that may get to that. I don't
17 think we support in full that language, but -- but it's a
18 lot closer than it would be otherwise.

19 Outside of that, I think, from our standpoint,
20 we're prepared to answer questions.

21 Oh, and (K) -- I'm sorry -- (K) is also one that
22 has two different possible solutions. There's two -- two
23 offered here. The second one, the one that's underlined,
24 "Arrangements in a secret ballot election pursuant to

1 this order," we think that that is better language. I
2 just -- it's more of a technical item with us. We think
3 the other language fell somewhat short, because it seems
4 like, if someone is working 12-hour shifts now, or a
5 group of people are working 12-hour shifts now, that you
6 could potentially have people get a pay raise as a result
7 of maintaining those shifts, because of that rule. And
8 it's a -- it's a highly technical argument that I don't
9 think we want to spend a lot of time on, but we think it
10 would be much better to adopt the language that makes it
11 more specific, that if you dropped the shifts -- if you
12 dropped the hourly wage rate before, it's going to remain
13 the way it was before you dropped them. And we're all in
14 favor of that.

15 But we -- but we think that other language in
16 some ways could be interpreted differently. So it's a
17 very complicated legal analysis. So if you like the
18 language that's underlined and you're okay with that, we
19 would prefer it.

20 And that concludes the testimony, and we'll be
21 happy to answer any questions about these proposals or
22 others. I wasn't going to address Mr. Broad's proposal
23 specifically --

24 COMMISSIONER DOMBROWSKI: That's fine.

1 MR. MADDY: -- but I can do that as well.

2 COMMISSIONER BROAD: Mr. Maddy, tell me about
3 the way you get overtime after working 24 hours, that
4 issue. I was confused by that.

5 MR. MADDY: Which proposal? I'm sorry.

6 COMMISSIONER BROAD: You mentioned early on that
7 there was -- you guys were okay with someone who worked
8 three 12-hour days getting overtime after 36 hours a
9 week, but there was some way in which you got overtime
10 after working -- you mentioned 24 hours. I just couldn't
11 -- I didn't understand what you were referring to.

12 MR. MADDY: Well, under -- under the scenario,
13 if you adopt an alternative workweek schedule that says -
14 - say that you work Monday, Tuesday, Wednesday, that's
15 your three -- that's your three days. Under this
16 language, if you adopt that schedule and someone is --
17 someone switches to Monday, Tuesday, Thursday and the
18 employer has anything to do with that change, whether
19 someone -- whether one employee comes and says -- and
20 says, "I can't work -- I can't work my usual Thursday;
21 can you help find somebody to switch so that I can work -
22 - so I can work Wednesday instead and the person -- one
23 of the people on Wednesday can work Thursday?" If the
24 employer is involved in that at all, according this

1 language, because they didn't work the same number --
2 because they worked different days, they worked Monday,
3 Tuesday, Thursday instead of Monday, Tuesday, Wednesday,
4 they would get premium pay more than you would if you
5 didn't have a schedule that said you work Monday,
6 Tuesday, Wednesday. If you had a schedule, which you're
7 allowed to do under the elections procedure, that says
8 your schedule is three days a week, 12 hours a day, if
9 that's your schedule
10 -- you could set it up that way according to the
11 elections procedures -- then you would be treated
12 differently. You wouldn't be -- you wouldn't be subject
13 to that premium pay.

14 COMMISSIONER DOMBROWSKI: You're talking about
15 Section (A) there?

16 MR. MADDY: Yes.

17 COMMISSIONER DOMBROWSKI: Where we talked about
18 putting in "number of.

19 MR. MADDY: Right.

20 COMMISSIONER DOMBROWSKI: "Number of" resolves
21 that problem.

22 MR. MADDY: Right. So our suggestion is "number
23 of workdays."

24 COMMISSIONER DOMBROWSKI: Got it, okay.

1 MR. MADDY: And then that solves the problem.

2 COMMISSIONER BROAD: Well, so what that means
3 is, that if someone says, "You work three days a week,"
4 at six o'clock on the morning, on any day of the week,
5 the employer can say, "Come to work today." To create --
6 how is that "regularly scheduled" in accordance with the
7 statute? That's the problem -- that's the part I have --
8 the problem I have with it. How can you have something
9 "regularly scheduled" that isn't regularly scheduled?

10 MR. MADDY: Well, if you -- that's an
11 interpretation of the statute on your part because it's
12 not defined in the statute, what "regularly scheduled"
13 is. In fact, "alternative workweek schedule" is in
14 there, and that doesn't refer to specific days of the
15 week. I think you'll have a tremendous, tremendous
16 problem is you schedule specific days of the week in an
17 environment where people want flexibility. This is --
18 this is an opinion of ours.

19 COMMISSIONER DOMBROWSKI: Right. Yeah, I'm
20 sympathetic to their position, Barry. I mean, as you and
21 I have talked, I mean --

22 COMMISSIONER BROAD: Right.

23 COMMISSIONER DOMBROWSKI: -- if you're going to
24 try to set this thing up, you've got to -- you've got to

1 leave some flexibility in there.

2 COMMISSIONER BROAD: Right.

3 COMMISSIONER DOMBROWSKI: You can't -- you can't
4 specifically --

5 COMMISSIONER BROAD: Which is why I had proposed
6 that, by agreement with the employer, the employee could
7 switch, in my proposal.

8 MR. MADDY: We have that proposal, but --

9 COMMISSIONER BROAD: What's wrong with that?

10 MR. MADDY: We have that proposal, but in this
11 proposal, if they switch, they have to be paid more, in
12 either case. We're against your proposal, by the way,
13 but for technical --

14 COMMISSIONER BROAD: Well, it says "without" --
15 it says "without incurring" --

16 MR. MADDY: -- for technical purposes. "Number
17 of workdays" is consistent with the elections procedure
18 and it treats -- there's disparate treatment between
19 people based on the way they set up their schedules.
20 That's not equitable. You're raising a different issue
21 than what I'm raising here.

22 COMMISSIONER BROAD: Well, what -- well, I --
23 that's possible.

24 MR. MADDY: Right. But if "number of" --

1 COMMISSIONER BROAD: But if the -- no -- if the
2 schedule says you work -- you're going to work four 10's
3 and you're going to work Monday, Tuesday, Wednesday, and
4 Thursday, and the employer comes and says, you know, "Can
5 we switch it around, if it's okay with you, to a Friday
6 instead, and you're going to switch to another employee,"
7 my proposal is saying that could be done without
8 incurring any change in cost to the employer in terms of
9 overtime. There would be no -- it would be part of the
10 regular schedule.

11 It's just that it -- that I do not understand,
12 conceptually, how you can have a regularly scheduled
13 alternative workweek in which all you know is that you
14 are working so many days of so many hours. Well, there's
15 nothing -- it could be totally and completely irregular.

16 MR. MADDY: Well --

17 COMMISSIONER DOMBROWSKI: Let me just interject.
18 In our "Statement as to the Basis" for the interim wage
19 order -- I believe this is right -- we have a sentence in
20 there that says, in our election procedures, the actual
21 days worked within that alternative workweek schedule
22 need not be specified.

23 COMMISSIONER BROAD: I -- I understand that. I
24 just don't think it's consistent with the statute. And

1 it will be unworkable, because what it does is it
2 creates, in effect, a form of on-call employment. And I
3 don't see how on-call employment can be "regularly
4 scheduled."

5 MR. MADDY: Well -- and I know people that have
6 both types of schedules. My brother-in-law is a police
7 officer here in town, and he has specific days and he's
8 locked into those days for six months. According to this
9 proposal -- or, actually, according to this proposal that
10 we're agreeing to, you are locked in for a year.
11 Somebody changes their vacation. What do you do?
12 Somebody wants to change their schedule. You have to pay
13 premium pay to change somebody's schedule.

14 You're saying it always has to be voluntary. I
15 don't -- I don't disagree that calling someone at six
16 o'clock in the morning and completely changing their
17 world is not a good thing. I don't think that the
18 employment -- I don't think the employers want to do that
19 to employees. You can't -- but you can't create an
20 entire workplace environment that assumes the worst at
21 every single step of the way, because you can do that and
22 then you will get the worst. You'll have employees that
23 can't change anything for a year. That's where we
24 disagree. We think that employees need to have a chance

1 to change, but sometimes employers need a chance to
2 change. We don't think that's unreasonable.

3 This locks in schedules for a year. There's a
4 lot of ways you could structure your schedule. You could
5 have people for three months or one month work Monday,
6 Tuesday, and Wednesday, and then they can switch to
7 Thursday, Friday, Saturday so -- so people don't have to
8 work the weekends all the time. I agree with that. But
9 there's a point where somebody may have to replace the
10 other person.

11 In the police --

12 COMMISSIONER BROAD: Well, see, I don't disagree
13 with you, and I think that's a reasonable point. But I -
14 - I also think that given the way the healthcare industry
15 works and the problems that you've had with labor issues
16 in the healthcare industry, that -- that it's reasonable
17 to protect against the worst while giving employers the
18 flexibility that they need, because I believe that there
19 will be situations in which, you know, it'll be any
20 number of hours up to 12 on any days of the week that we
21 pick. And the notice that the employee will get will be
22 twenty minutes. And that is not a "regularly scheduled"
23 workweek.

24 Now, can we construct something -- which was my

1 effort to do -- that says if people want to switch
2 around, one day for the next, by mutual consent, that's
3 fine. You know, I -- I even think we can probably
4 construct that says, you know, for business necessity on
5 a nonrecurring basis, if an employer wants to switch
6 somebody around, that's fine. But people expect to go to
7 work on certain days. That's normally how people go to
8 work, I mean, right?

9 MR. MADDY: Well, if you want me --

10 COMMISSIONER BROAD: They don't expect --

11 MR. MADDY: If you want me to respond, I say,
12 yes, people to go to work on days. But your proposal did
13 not try to address exceptions. Your proposal is
14 sweeping. Most of your proposals in here are very
15 sweeping in their lack of flexibility for the workplace,
16 for both employees and employers, because you're
17 presuming when you write them, in large part, the problem
18 that happens occasionally as opposed to the situation
19 that's going on every day.

20 And we -- we -- you know, we tried to think of
21 ways to amend these and we tried to think of ways to come
22 back, but they're very sweeping. And we have to have at
23 least some sense of workplace flexibility without the
24 presumption that everybody is trying to put one over on

1 the other person.

2 You know, we -- there's a lot of aspects of your
3 proposal that put a third party in between people. You
4 know, I would think the goal should be for employers and
5 employees to communicate better with each other, as
6 opposed to always trying to figure out a way to have them
7 be able to communicate through a third party. You know,
8 this is -- this is a thread that runs throughout this.
9 And we need to try to have open communication when it
10 works.

11 On -- on the elections, for example, what if
12 five -- there's five employees and one employer in a
13 health clinic, they want to go to alternative workweeks,
14 you've got to get a neutral third party. What if you --
15 what if you're in Crescent City? So, you know, are you
16 going to hire somebody that's -- that's going to be
17 qualified by the Labor Commissioner to come in and
18 arbitrate. I mean, everybody's -- and you have to have a
19 secret ballot, you know. Everybody stands there and
20 says, "Hey, we all want an alternative workweek."

21 COMMISSIONER BROAD: I agree with you. I
22 actually agree with you. And what I've suggested --

23 MR. MADDY: There's a lot of problems with these
24 things.

1 COMMISSIONER BROAD: Well, let me just see
2 whether, then, this change in language is okay for you.
3 Rather than say, "The employer shall select a neutral
4 third party to conduct the election from a list
5 maintained by the Labor Commissioner of approved neutral
6 third-party organizations," it was to say, "Only on a
7 complaint by an affected employee and after an
8 investigation by the Labor Commissioner, the Labor
9 Commission may require the employer to select a neutral
10 third party to conduct the election"? Does that solve
11 that problem?

12 MR. MADDY: Well, we spent -- we spent about
13 five or six hours talking to labor representatives, and I
14 thought it was very productive in a couple of senses. We
15 did -- we figured out where we disagreed, in large part,
16 but we -- but we did figure that when you assume the
17 worst or you assume the best, it doesn't always work out.
18 And this is another situation. I mean, there's --
19 there's -- 80 percent of the population is in 11 counties
20 in the State of California, 20 percent is in 48 counties.
21 You've got to find -- you've got to find -- for the
22 people that are just simply trying to have the employer
23 and employee work out a schedule that's allowed by law,
24 you've got to go through hoops and loops, and you've got

1 to pay money. And it's not quite there.

2 I mean, if there's -- you know, if we're going
3 to have more discussions on this and try to come up with
4 a solution, that's -- but about the half the proposal,
5 you know, we didn't -- we couldn't agree on because of
6 details of it. About half, you know, we could say, well,
7 logically, in most cases it'll work. But most cases --
8 most cases is not what we're after here. We can't -- we
9 can't have everybody go down a pathway that is only
10 preserved -- we're only trying to enforce something
11 that's going wrong for a few.

12 COMMISSIONER BROAD: Well, that's generally how
13 the law works. But --

14 MR. MADDY: Well, and that's --

15 COMMISSIONER BROAD: -- my question for you is -
16 -

17 MR. MADDY: -- and that's unfortunate sometimes.

18 COMMISSIONER BROAD: You do believe that
19 elections in the United States generally should be held
20 in a neutral atmosphere.

21 MR. MADDY: Absolutely.

22 COMMISSIONER BROAD: And that it's not -- and
23 that it's not inappropriate for -- in circumstances where
24 there is an argument that is investigated and it's

1 determined that there is not a neutral atmosphere, that a
2 neutral conduct the election, if -- if -- I just think
3 that it's sort of standard red-white-and-blue Americanism
4 to believe that elections should be free from corruption.

5 MR. MADDY: Well, you know, if you're trying to
6 put that into my mouth -- you know, if you're trying to
7 put that I believe in corruption in my mouth, you know,
8 you're
9 -- you're going down the wrong path.

10 I'm just talking about five people -- five
11 people --

12 COMMISSIONER BROAD: Um-hmm.

13 MR. MADDY: -- five employees and employer.
14 They all get along. They just want to change their
15 schedule. According to the law, they can't do it without
16 having a secret ballot. They can't raise their hand;
17 it's got to have a secret ballot. They can't just agree,
18 they can't just sit around and agree; they have to get an
19 arbiter to come in and make sure that they were all
20 thinking straight or whatever they're supposed to be
21 doing. I mean, it's just -- you know, to me there's --

22 COMMISSIONER BROAD: Well, that pesky secret
23 ballot thing is in AB 60.

24 MR. MADDY: I know. And we're -- we're okay

1 with it, because we know you've got big -- you've got big
2 situations as well as small. But you go way beyond that.
3 We're fine with two-thirds vote, we're fine with secret
4 ballot. You know, we're okay with all that. We're okay
5 with AB 60 as far as these rules go, because it's the
6 law. So we're going to be okay with that part.

7 But when you go way beyond that in a regulation,
8 it's way beyond -- it's way beyond what the Legislature
9 viewed as where they wanted to go. And we've talked very
10 specifically about the problems that you create. I know
11 what you're saying. You've got a couple situations that
12 are bad and you -- and you've seen them, and you want to
13 address them. I don't -- I don't disagree with that.
14 You just -- but you're going to put that onto everybody
15 to go through a lot of bureaucratic hoops and loops to
16 get there. I think
17 -- I think there's other solutions that could be worked
18 out. We're not going to be able to do them today, but I
19 think there's other solutions that can be worked out.

20 COMMISSIONER BROAD: Thank you.

21 MR. MADDY: Thanks, Barry.

22 COMMISSIONER DOMBROWSKI: Any other questions?

23 (No response)

24 COMMISSIONER DOMBROWSKI: Any other comments

1 that you want to make?

2 MS. MESSER: Yes. Kerry Rodriguez Messer, with
3 the California Association of Health Facilities. And I
4 wanted to address the definitions that Mr. Maddy has
5 already made reference to, the two different definitions
6 of the healthcare industry.

7 And we are supportive of the second, in that we
8 think it is more proscriptive than descriptive about the
9 type of environments in which health and preventive
10 programs are administered.

11 COMMISSIONER DOMBROWSKI: Let me -- let me
12 state, since it's the proposal I circulated for comment,
13 that I would -- that I would amend this proposal to
14 incorporate the underlined sections that were suggested
15 by the healthcare industry, so -- and also with the
16 inclusion of the word "number of workdays" in Section
17 (A), so just so that's -- so everybody understands what
18 we're looking at here.

19 MS. MESSER: Any questions?

20 (No response)

21 MS. REES:: Kathy Rees, representing the
22 California Assisted Living Facilities Association. Our
23 facilities are typically licensed by the Department of
24 Social Services. 365 days a year we staff. We primarily

1 provide care for the frail elderly population.

2 I'd just like to address one point that maybe
3 hasn't been dwelt on so dramatically.

4 We support the definition that Mr. Dombrowski
5 just referred to, and that certainly Mr. Maddy was
6 describing.

7 In the course of all these discussions, the very
8 people that we care for we cannot lose sight of. I don't
9 know how many of you have walked in the shoes of having
10 parents in these situations or parents in acute-care
11 settings, but I'll tell you, it's a whole lot easier to
12 work with their care and work within a framework when
13 you're dealing with two people who are their primary
14 caregivers a day than when you're dealing with multiple
15 staff. And so, from the standpoint of efficiency,
16 credibility, continuity, I strongly urge, for the -- for
17 both the patients' circumstance as well as for the
18 express desire of most of our employees, to have this
19 flexibility is very, very critical to the kind of model
20 of care that we provide.

21 Thank you.

22 COMMISSIONER BROAD: Can I just ask a question -
23 -

24 COMMISSIONER DOMBROWSKI: Absolutely.

1 COMMISSIONER BROAD: -- about this definition of
2 healthcare industry? It says, "For purposes of this
3 order, the . . . 'health care industry' is intended to
4 cover, but is not limited to, employees who work at or
5 for facilities or organizations that provide health care
6 services." If it's not limited to it, what are the --
7 what does the unlimited part refer to? What industry --
8 what does "not limited" mean?

9 MR. MADDY: Richard?

10 MR. SIMMONS: The objective here was to --

11 MR. MADDY: Identify yourself.

12 MR. SIMMONS: I'm sorry. Richard Simmons, from
13 Sheppard, Mullin, Richter and Hampton, here to represent
14 the California Healthcare Association.

15 Mr. Broad, the objective in that definition was
16 to make sure that issues were put to rest in terms of the
17 broad scope of the healthcare industry. And the idea was
18 to identify in practical terms those facilities and
19 entities that readily came to mind, without suggesting
20 that there could be no other entities in the healthcare
21 industry that would also be part of the healthcare
22 industry.

23 COMMISSIONER BROAD: So "an organization or
24 facility that indirectly provides healthcare" would mean

1 any workplace in the State of California where somebody
2 hands out a Bandaid, by what I -- how I read that.

3 MR. SIMMONS: Well, it would only be within the
4 purview of this order. I think the -- the general rule
5 has always been that when you have a more specific order
6 that deals with an industry specifically, then that
7 situation will not even be examined under Wage Orders 4
8 or 5, that would instead be examined under the applicable
9 wage order, like Wage Order 7 if it was a retail
10 environment, Wage Order 1 if it was in a manufacturing
11 environment, something like that.

12 So, I don't think that this language lends
13 itself to that potential problem.

14 COMMISSIONER BROAD: Well, isn't this -- this is
15 a proposal for Wage Order 4 and 5, correct?

16 MR. SIMMONS: Correct.

17 COMMISSIONER BROAD: Okay. Well, Wage Order 4
18 crosses all those lines because it's an occupational wage
19 order.

20 MR. SIMMONS: Well, in reality, I think Wage
21 Order 4 would only apply, again, in those occupations
22 that are not governed by a specific industry-wide wage
23 order.

24 COMMISSIONER BROAD: Okay. And then it says the

1 facility -- then they -- it talks about employees who
2 work in "ancillary fields." What are "ancillary fields"?
3 Are we back to the janitors and the security guards at
4 the hospital with this? Is that intended to include
5 every employee that works at a hospital?

6 MR. SIMMONS: Well, I -- I do think -- I don't
7 know that I could give you an all-inclusive definition of
8 the ancillary fields --

9 MR. MADDY: Why don't we let Tom -- Tom, you
10 want to address that?

11 MR. LUEVANO: Tom Luevano, chief labor and
12 employee relations officer for Sutter Health.

13 Commissioner Broad, from my perspective, it does
14 intend to include all classifications within healthcare.
15 We do have employees who work 12-hour work shifts who
16 work in our environmental services unit, who also work in
17 the plant operations and maintenance unit, who work in
18 the food service unit. It's not limited to, as
19 previously defined, direct patient caregivers. We have a
20 number of units.

21 Our business office is an example. When I was
22 looking at this language, I was trying to determine
23 whether or not it would cover our central billing office
24 staff, who do work 12-hour workdays. And from my

1 perspective, it would cover -- I'm hoping that it would
2 cover all classifications.

3 COMMISSIONER BROAD: So it would cover the
4 secretary that works for your lobbying organization in
5 downtown Sacramento that has no patients coming to it.

6 MR. LUEVANO: I -- I don't have a -- I don't
7 work for a lobbying organization --

8 COMMISSIONER BROAD: Whatever. And that means
9 it applies to all the employees in the steam plant, for
10 example.

11 MR. LUEVANO: If you're talking about plant
12 operations and maintenance --

13 COMMISSIONER BROAD: Yeah.

14 MR. LUEVANO: -- Commissioner Broad, you're
15 correct.

16 COMMISSIONER BROAD: Gardeners.

17 MR. LUEVANO: If we had gardeners as a
18 classification and if they elected to work 12-hour
19 workdays, you're correct.

20 COMMISSIONER BROAD: How do you square that with
21 the statute that -- if that's the case, we could simply
22 create 12-hour days for every single employee in the
23 state. There's no -- there's no rational distinction
24 between a gardener at a hospital and a gardener at any

1 other place of business.

2 MR. LUEVANO: Commissioner Broad, I -- quite
3 honestly, and I don't mean to be disparaging -- I'm not
4 concerned about other industries. I'm really only
5 concerned about the healthcare industry and what we have
6 done for the last twenty to twenty-five years.

7 I've been in this business for almost twenty-one
8 years. I've had alternative work schedules in this
9 industry well before we had any changes to the wage
10 orders. In southern California, we were one of the first
11 healthcare facilities to do alternative work schedules,
12 doing what you dislike, which was the reduced rate. But
13 that was the only way that we could accommodate the
14 request of the employees.

15 And so --

16 COMMISSIONER BROAD: Tom, I --

17 MR. MADDY: Could I interrupt for a sec? I'm
18 sorry, but if the concern is that we've limited -- that
19 we've not limited enough employees, where it says "but is
20 not limited to employees," we'll take that out. We'll
21 take that out. We don't want to -- we don't want to take
22 out the list of healthcare -- places where healthcare is
23 happening, because we gave a list and there could be
24 other places. But we'll take that out.

1 COMMISSIONER BROAD: Now, let ask another
2 question. Ambulance drivers are under Order 9,
3 transportation. They are not under Order 4 or 5 now. Do
4 you intend to switch them from the transportation wage
5 order to this order?

6 MR. LUEVANO: I can't answer that. I don't --
7 we don't -- we don't employ ambulance drivers.

8 MR. MADDY: Maybe Mr. --

9 COMMISSIONER BROAD: Ambulance --

10 MR. MADDY: Mr. Simmons might want to answer
11 that.

12 MR. SIMMONS: Mr. Broad, if -- if an ambulance
13 company were covered by Wage Order 9, then it is true
14 that its driver would be governed by Wage Order 9. But
15 if a hospital were to directly employ an ambulance
16 driver, then the ambulance driver, like all other
17 employees of the hospital, would be governed by Wage
18 Order 5.

19 And that is why there has always been
20 historically a provision in Wage Order 5 that addressed
21 ambulance drivers in the past.

22 COMMISSIONER BROAD: Okay. Thank you. But let
23 me just ask one more question. What's a "dispensary"? I
24 mean, obviously that's a term of art.

1 MR. MADDY: Tom, do you want to talk about why
2 we put "dispensary" in there, or Richard? Anybody want
3 to answer it?

4 MR. LUEVANO: Quite honestly, having -- and I
5 apologize to the group -- I got this just about ten
6 minutes before, and probably at the same time you did, so
7 I'm looking at this -- I would have to -- I would have to
8 defer --

9 COMMISSIONER DOMBROWSKI: It's a pharmacy, isn't
10 it?

11 MR. LUEVANO: Yeah, well --

12 COMMISSIONER DOMBROWSKI: In-store hospital
13 pharmacy.

14 MR. LUEVANO: -- if you -- by definition, if
15 you're saying dispensary was a pharmacy, then we could
16 substitute the word "pharmacy."

17 MR. MADDY: This was the work of a number of
18 people that put input into this definition, so --

19 MR. LUEVANO: I mean, we have -- we have -- we
20 have pharmacies that are centrally located that, by
21 definition, we would say they are pharmacies. We have
22 dispensaries, which are not full-service pharmacies, that
23 are on the units, where there's a limited amount of
24 medications for patients. That I would constitute as a

1 dispensary. But if this is intended to cover pharmacies,
2 all-inclusive, then my recommendation would be -- it
3 would be amended. But I'm going to leave that up to
4 whoever's drafting it.

5 MR. MADDY: Well, it -- I don't -- you know, if
6 someone here that wanted that in that represents one of
7 the groups --

8 COMMISSIONER DOMBROWSKI: Dispensaries is a
9 term, I think, that's in the industry.

10 MR. MADDY: Okay. Questions?

11 COMMISSIONER DOMBROWSKI: Commissioner Bosco.

12 COMMISSIONER BOSCO: Could I ask, under the
13 existing orders, how is the healthcare industry defined?
14 And does this broaden it or make it more narrow?

15 MR. SIMMONS: Commissioner Bosco, the term is
16 not itself directly defined in the wage orders. When the
17 healthcare industry approached the Commission back in
18 1992 and 1993 to request modifications, there was at that
19 time no attempt to define healthcare industry. It was
20 simply a declaration as the intended breadth of those
21 1993 amendments in the petition that was filed.

22 Because confusion has existed since then as to
23 what the term "healthcare industry" really does
24 encompass, we thought it best actually to define it now.

1 But this would be the first actual definition
2 within any wage order, to my knowledge.

3 COMMISSIONER BOSCO: So, in other words, up till
4 now, we've been operating under no definition at all, and
5 this is the first attempt to kind of decide the
6 parameters of this industry.

7 And also, does this include -- I've gotten like
8 200 calls from veterinarians -- is this -- are they part
9 of the healthcare industry now? And how do they fit into
10 this definition, because I don't notice "human" in here
11 as a limiting factor?

12 MR. SIMMONS: Would you like them to be
13 included?

14 COMMISSIONER BOSCO: Well, I'm asking if they
15 are included. I -- my vet would like to be.

16 MR. MADDY: They can be included.

17 COMMISSIONER BOSCO: No. I mean, in all
18 seriousness, that's a big industry, and for one reason or
19 another, they all are impeaching the Commission to do
20 something about their situation. And is this -- are they
21 included in this definition?

22 MR. SIMMONS: I think they should be. And it
23 may be beneficial to specifically identify them, if the
24 Commission deems it appropriate.

1 MR. MADDY: Right. I guess it would be possible
2 that the Business and Professions Code could have a
3 different definition of "healthcare" that may exclude
4 them, so we should probably list them if we want to.

5 MS. RODRIGUEZ-MESSER: Mr. Bosco, I would also
6 just sort of clarify with regard to your question. The
7 healthcare industry has changed a lot, and because there
8 wasn't a firm previous definition -- sometimes it was
9 broader than we thought it ought to be, sometimes it was
10 narrower than it ought to be -- the industry I represent
11 basically is that part of the healthcare continuum that
12 used to be considered the intermediate care facility, of
13 nursing homes. And now it's called assisted living, and
14 it's licensed by the Department of Social Services
15 instead of Health Services. But we still provide various
16 levels of healthcare there, and we do have 365 days, and
17 we do have frail elderly and a lot of different needs.

18 So, from our perspective, it is very critical
19 that there not be any ambiguity about whether or not
20 residential care facilities for the elderly are included.
21 It's -- it's most critical.

22 COMMISSIONER BOSCO: Well, this would clearly
23 cover home healthcare --

24 MS. MESSER: Right.

1 COMMISSIONER BOSCO: -- nursing homes --

2 MS. MESSER: Yes. And so much healthcare is
3 moving into the home and out of hospitals. So there's
4 really a need for this sort of clarification.

5 COMMISSIONER BOSCO: Now everybody's going to
6 want to write their own version here, I can tell that.

7 MS. MESSER: The -- the other -- the other
8 comment I would make is, since there have been some
9 allusions to AB 60, the only objection that I, and
10 perhaps my clients, have to AB 60 and its passage is that
11 the Legislature exempted themselves, and our hours are
12 set by theirs. So --

13 COMMISSIONER BOSCO: Well, that's not uncommon.
14 I could point out about six or seven different times that
15 that happens.

16 All right. So, I guess the answer to my
17 question is that we're dealing now for the first time
18 with defining this industry, how broad it is, how narrow
19 it is, and whether it includes animals.

20 MR. MADDY: Yes, Mr. Bosco.

21 COMMISSIONER BOSCO: Okay.

22 COMMISSIONER DOMBROWSKI: Any other questions?

23 (No response)

24 COMMISSIONER DOMBROWSKI: Other witnesses in

1 support, if you could -- unless you have something new,
2 just identify yourself, your affiliation, and your
3 support.

4 MR. ARNOLD: Michael Arnold, representing the
5 California Dialysis Council, a statewide association of -
6 - of dialysis facilities.

7 Obviously the issue is in -- in some flux. Just
8 hoping that dialysis facilities, under whatever
9 definition you come up with, are permitted to have a -- a
10 12-hour day.

11 In dialysis, it's a -- it's a situation where
12 it's best for the employees, for the employer, and most
13 importantly, for the patients, because dialysis patients
14 dialyze three times a week for three or four hours a day.
15 Our dialysis facilities usually run two 12-hour shifts.
16 One starts at six a.m. in the morning and finishes at six
17 p.m. The other shift starts at nine a.m. and finishes at
18 nine p.m. This accommodates the needs of the patients,
19 of the employees, and of the employer.

20 So we want to just make sure we go on record as
21 asking that dialysis facilities are given the ability to
22 have the 12-hour day.

23 COMMISSIONER BROAD: Mr. Arnold, other than
24 adding dialysis clinics, you have no other issues with

1 regard to the proposal?

2 MR. ARNOLD: Mr. Broad, I think we can live with
3 any other issues that -- that -- I'm sorry -- with any
4 other language that all the other employer community can
5 live with. We just wish to have ourselves included as
6 the -- as having the ability to have the 12-hour day.

7 COMMISSIONER BROAD: Yeah, I agree. I agree
8 that you should be included.

9 MR. ARNOLD: Thank you, sir.

10 MS. KOWALEWSKI: Denyne Kowalewski, representing
11 the California Association for Health Services at Home.

12 We agree with the 12-hour workday. However,
13 where we have difficulty is that our members represent
14 home health and hospice clients, and we have difficulty
15 with the term "regularly scheduled." Our workers go out
16 to homes, and we don't know what we're going to expect
17 from day to day. We are intending to give the employees
18 a regularly scheduled workday, but they may show up on a
19 Tuesday and the patient has been sent to the hospital or
20 will be sent mid-shift. And there's no flexibility for
21 an alternative work schedule.

22 And I guess one of the things that CAHSAH was
23 looking at is one of the options that employees could
24 vote for is a flexible work schedule, that is --

1 COMMISSIONER DOMBROWSKI: Did we not -- we just
2 talked about "number of" days, earlier in the discussion.
3 Does that -- doesn't that address your issue?

4 MS. KOWALEWSKI: No, it does not address the
5 issue.

6 COMMISSIONER DOMBROWSKI: Why is that?

7 MS. KOWALEWSKI: Because you -- we may have four
8 days, but, again, an employee may show up to a home on
9 their second day and the patient has been discharged or
10 has gone to a hospital that day.

11 Holly Swiger, from Vitas Healthcare, can add
12 more information to that here.

13 COMMISSIONER BROAD: Well, let me just ask this
14 question, though. I mean, that just makes them sort of a
15 standard worker. You don't need an alternative workweek.
16 They show up to work and there's no work to do, the
17 employer can choose to send them home and incur no
18 additional cost. So I'm -- I'm kind of confused.

19 MS. SWIGER: Well -- my name is Holly Swiger,
20 and I'm actually here with Vitas and also the California
21 Hospice and Palliative Care Association.

22 What's a little different when you work in
23 community-based care, home health and hospice, is -- I
24 don't like to say this, being both in the -- being in the

1 shoes of what brought me here as a nurse to hospice, but
2 then as an employer too -- the employer is a little bit
3 less in control in this case.

4 The law actually mandates that our team manages
5 the patient and decides what care to go in and when. So
6 it's not like they have a shift where they hand over the
7 care to another person. They're responsible. We have
8 on-call staff to handle emergencies and that, but Monday
9 through Friday, they're responsible for the care needs of
10 that patient and family. And it may be that they need to
11 have dialogue with the family in the evening. So trying
12 to coordinate their time and only scheduling -- they
13 schedule their own time, so they work seven days during
14 the -- seven hours during the day and they expect to do
15 an hour of care at night, and they can't reach that
16 family member, or that family member can't talk. Now
17 they only get paid seven hours, under the current wage
18 scale.

19 So we --

20 COMMISSIONER DOMBROWSKI: Well, let me -- let me
21 just -- I mean, we have had a lot of discussion on this
22 issue for the last six months, and, I mean, there are
23 just some things we can't do. Section 511(a), AB 60, has
24 termed "regularly scheduled alternative workweek" --

1 that's in the statute, and we can't change that. So, I
2 mean, I can appreciate your problem, but our hands are
3 tied.

4 MS. SWIGER: The other issue that we'd just like
5 to speak to is the limitation on your proposal, as I
6 understand it, Barry, to the licensed and certified.

7 Again, I think I mentioned this previously. We
8 have people that are master's and doctoral-prepared, but
9 they aren't necessarily licensed and certified, and are
10 actually more educated in the area. We'd like it -- if
11 we're looking at the healthcare proposal as presented
12 here earlier by the Healthcare Association, we support
13 that as it being broader to include those.

14 COMMISSIONER BROAD: Okay. I would just say
15 that if you're talking about people that have, you know,
16 Ph.D.'s and master's degrees in professions, that they
17 would be exempt from overtime as professional employees.
18 In other words, if -- I mean, if you're talking about,
19 say, a licensed psychologist or something that goes and
20 visits someone, they're a professional. I -- so I'm not
21 --

22 MS. SWIGER: Maybe I'm confused, then. Would
23 chaplains -- I know -- I know that's always an issue
24 here.

1 COMMISSIONER BROAD: I -- I would ask you to
2 talk to the people from the Labor Commissioner's office.
3 I'm not sure --

4 MS. SWIGER: Okay.

5 COMMISSIONER BROAD: -- how religious
6 professionals are dealt with. But my guess is that
7 priests, rabbis, ministers are not -- are exempt from
8 overtime. But I -- I could be wrong, but that -- I think
9 we might ask for some clarification. That issue has not
10 arisen --

11 MS. SWIGER: Okay.

12 COMMISSIONER BROAD: -- in the -- before, but,
13 you know, it seems like there's something every minute
14 here.

15 COMMISSIONER DOMBROWSKI: Well, let's get -- I
16 mean, you can do that, to the Department of Labor.

17 MS. SWIGER: Thank you.

18 COMMISSIONER DOMBROWSKI: Robyn.

19 MS. BLACK: Mr. Chairman, members, Robyn Black,
20 with Aaron Read and Associates, on behalf of California
21 Society for Respiratory Care.

22 Mr. Chairman, Mr. Broad, and the members, as you
23 know, the 12-hour shifts is extremely important to our
24 members, and as opposed to their representative telling

1 you their stories this morning, I'd like to introduce to
2 you this morning Randy Clark, who is the president of the
3 California Respiratory Care Therapists.

4 MR. CLARK: Thank you, Robyn.

5 Mr. Chair, Mr. Broad, and commissioners, what
6 I'd like to say is we don't want to pick the proposal
7 apart, and certainly don't want to pick this brand-new
8 proposal -- I just looked at it -- apart. What we'd like
9 to say, from the 17,000 members of the society, is we
10 appreciate the efforts of this Commission, who are going
11 to make some sense out of all these controversial issues.

12 And we especially want to thank Mr. Broad
13 personally for taking our phone calls and spending the
14 time and extending to us every professional courtesy
15 available that he has.

16 And we want to tell you that we trust that the
17 final solution will be fair and just and allow the
18 flexibility for employees and employers alike, and that
19 the appropriateness of whatever is decided at the end of
20 this day or at the end of another meeting is going to be
21 appreciated.

22 So, on behalf of the society, we give you 17,000
23 thank yous and 17,000 "we appreciate the work you're
24 doing."

1 Thank you.

2 MS. BLACK: Mr. Chairman, if I may add too, I'd
3 like to also thank the members of the Commission, and in
4 particular Mr. Broad and Mr. Dombrowski, for a tremendous
5 effort. For something that is supposed to be a part-time
6 job, this is a full-time job, and this Commission has
7 been very dedicated.

8 And, Mr. Dombrowski, I will remind you the best
9 title in the world is "former chair of the IWC." So,
10 good luck.

11 MS. LAUBACHER: Cindy Laubacher, on behalf of
12 the California Veterinary Medical Association. I'd like
13 to thank Commissioner Bosco for raising the issue with
14 regard to veterinary hospitals.

15 We would, in fact, argue that we are very --
16 very much just like -- we run just like a human hospital
17 except we deal with people's family pets instead of their
18 family members. Our facilities -- our staff -- our
19 facilities are comprised of regular offices as well as
20 surgical centers. Our employees that we are seeking to
21 have included in the provisions of this exemption do
22 everything from insert IV's to provide chemotherapy to
23 ultrasounds to hip replacement surgeries. It all
24 operates very similar, under similar circumstances. We

1 operate in emergency conditions. We have staff at 12-
2 hour and 24-hour hospitals that oftentimes have to, by
3 virtue of the number of patients in the facility at any
4 given time, have to work beyond an 8- or even 10-hour
5 day. And it's the employees who are seeking this.

6 We, in a -- in a veterinary hospital, we operate
7 on much different margins. We're much smaller. We have
8 much smaller staff to work with. And so, it's more
9 difficult for us, when we run into situations, as one of
10 our facilities did last weekend, where, Friday night,
11 they're looking at having -- at fifty animals that they
12 have to provide care for, and -- and trying to find the
13 staff to work beyond that 8 hours and be able to afford
14 that, it's very difficult for them. So, we would
15 appreciate inclusion in the definition of a licensed
16 healthcare facility.

17 Thank you.

18 MR. SKOIE: Hi. I'm Charles Skoien,
19 representing Community Residence Care Facilities of
20 California. We represent about 2,500 members. There's
21 about 12,000 facilities in the State of California.
22 Eighty percent of those are mom-and-pops, six beds and
23 under, with a reimbursement of \$27 a day.

24 We recommended something on definition to make

1 sure that our CFE's are residence care facilities -- or
2 Community Care Act is a part of the definition, which is
3 not in the original thing.

4 Yet we'd like to retain the 1993 amendments as
5 to the 80 hours, 14-day period. Also, it relates to
6 alternate workweek, 3(K). And then we basically would
7 love to work with your Commission and the Department of
8 Labor to put out a -- a booklet for our industry only,
9 which is a federal government booklet composed -- that
10 the University of Michigan put out that we'd cooperate.
11 So our people are educated and informed, so -- actually,
12 there was just this thing in California about -- in the
13 last fifteen months, 45 percent of the facilities were
14 out of compliance with the labor laws, federal labor
15 laws. And our biggest problem there is that we have 24-
16 hour people with three days, four days at the facility.
17 And how do you calculate that overtime? We'd appreciate
18 some help.

19 In our letter -- you have five-page letter that
20 asks for those definitions and descriptions. We'd
21 appreciate a response.

22 MR. JACKSON: Hi. My name is Wardell --

23 COMMISSIONER DOMBROWSKI: We'll address that,
24 from your letter, over here and --

1 MR. SKOIEN: Okay. Good.

2 MR. JACKSON: My name is Wardell Jackson. I'm
3 the president of the Association of California Care
4 Operators. I've been here before.

5 My main problem is that we represent some of the
6 same people that Chuck -- Chuck represents. We have 24-
7 hour, seven-day-a-week operation. We have people that
8 live in our facilities who -- who may not work during the
9 day, but they work overnight. It is a problem if -- with
10 this law, many of us, 80 percent of us, will go out of
11 business.

12 With the facilities that -- mainly that we
13 represent, we represent people that are -- get
14 reimbursement from the regional centers of California,
15 through the Department of Developmental Services, and we
16 -- our rates are much more than people who only deal with
17 the mentally ill. They get half, or sometimes a third of
18 the rate that we get. All of these facilities will be
19 out of -- out of business, because a lot of them do have
20 live-in staff that have to work overnight or 24 hours a
21 day. And there should be some other kind of -- I'm not
22 sure -- some -- something else that we can fall under,
23 because we basically don't fall under anything that you
24 basically have here today. We are a specialized

1 industry, and with the rates that we get, we could not
2 afford to pay according to these work orders.

3 So that's mainly our concern. Initially we were
4 requesting a waiver, because the Department of
5 Developmental Services right now is doing a rate study,
6 and that rate study will be completed by January 1, 2001.
7 And at that point, there may be raises in our rates. But
8 right now, we are still paid at almost 30 percent less
9 than we had been paid -- than we should be paid for this
10 kind of service.

11 So we're asking that either a waiver be given,
12 an exception be given, for at least 24 -- for 12 months
13 or -- for a 24-month waiver, really, to be given.

14 COMMISSIONER COLEMAN: Sir, let me just ask.
15 Your industry is covered under this proposal. And are
16 you in agreement with that or -- there's nothing we can
17 do about your rates. I'm certainly sympathetic to that
18 issue.

19 MR. JACKSON: No. Yeah, I understand that.

20 COMMISSIONER COLEMAN: But that's not something
21 the Commission can address.

22 We can include you in the definition of
23 "healthcare industries," which we are doing, which then
24 gives you the 12-hour day exemption. Is that something

1 that your industry supports?

2 MR. SKOIEN: If it would be retroactive to say
3 that -- some of our people don't have 12-hour days now,
4 alternative workweek, they'd have -- basically, May 31st,
5 we'd have to tell our people and educate our people they
6 can use the 12-hour work without overtime. Otherwise
7 they'd be paying overtime. We'd have that extension, to
8 May --

9 COMMISSIONER COLEMAN: You would have to follow
10 the procedures that the rest of the industry does in this
11 regard.

12 MR. SKOIEN: I have no problem. We -- most of
13 our facilities have complied with that. Our biggest
14 problem is the 24-hour person that lives there four
15 nights a week, takes off for three days, the sleep time -
16 - if we could really adopt the federal Labor Standards
17 Act as it relates to our industry, it would be the ideal
18 situation to do.

19 COMMISSIONER COLEMAN: Well, again, with AB 60,
20 we're not -- we're under stricter requirements --

21 MR. SKOIEN: Yeah.

22 COMMISSIONER COLEMAN: -- than the FLSA.

23 MR. MARTINNO: Yes. My name is Tony Martinno.
24 I'm going to -- I want -- I want to talk about the same

1 thing like -- oh, should I -- oh, sorry. Wrong button.

2 I want to talk about the same thing like Mr.
3 Wardell Jackson was talking about it. And my main
4 concern is the small facilities, like myself. I have an
5 employee that, you know, is a so-called exempt position.
6 You know, that person actually works 8 hours a day,
7 sometimes 7 hours a day. And according to the laws, when
8 my staff is asleep, we're going to have to pay for them.
9 And that's the place where, really, that's where --
10 they're at rest, they don't have no place to live.

11 And if you look in the letters Wardell Jackson,
12 he gave you, you can look at the figures there. And how
13 can I be in business if I'm going to have to pay for the
14 time my staff is sleeping? I have to put money out of my
15 pocket, you know, and that's -- and that's what Mr.
16 Wardell Jackson asked you, if we can have an extension,
17 at least until July, 2001. By then we should have some
18 more (inaudible) from the government. Other than that,
19 we're going to be out of business, and the people -- the
20 clients are going to be in the streets, because I cannot
21 continue to operate under the laws that they're trying to
22 impose on us, because we are mom-and-poppa, and again,
23 like I say, I pay over -- above a minimum wage.
24 Actually, this is my figure, \$6.50. And besides that, if

1 I -- if I cannot -- you cannot help us, I going home and
2 I'll close my facility.

3 COMMISSIONER DOMBROWSKI: Well, again --

4 MR. MARTINNO: The people are going to be in the
5 street.

6 COMMISSIONER DOMBROWSKI: Again, you are covered
7 by the definition that's been proposed. And I believe
8 that's about as far as we can go within the statute.

9 And in terms of the intricacies of your
10 business, I -- I would suggest you contact the Department
11 of Labor and make sure you're in compliance. And maybe
12 they can advise you about the nuances of this.

13 But in terms of what this Commission can do, I
14 think, if we adopt this, it's about as far as -- as we
15 can go.

16 MR. MARTINNO: Okay.

17 MS. SMITH: Good morning. My name is Lila
18 Smith. I am here as a single parent, representing many
19 more like me. I'm also a respiratory therapist that
20 works in southern California.

21 I work in an acute facility which has already
22 undergone the changes. I also work in a subacute
23 facility. I have two jobs.

24 I support the -- the changes of the -- with the

1 amendment. Without the changes, I will not be able to
2 continue working my two jobs and going to school.

3 I wanted to bring my two badges from the two
4 hospitals I work at and my -- my parking pass, to show
5 you that I do -- am I viable person in the community.

6 That's all I want to say. Thank you.

7 MS. HARDER: Hello. My name is Patricia Harder.
8 I work as a registered nurse for a subacute facility,
9 pediatrics, in Loma Linda, totally kids. And I'm here
10 representing our nursing staff to let you all know that
11 we do approve and support the proposal to include us in
12 the 12-hour workweek. There are many of us who support
13 the 12 hours due to educational reasons, being with
14 family, and continuity of care. And we do support it.

15 COMMISSIONER DOMBROWSKI: Thank you.

16 MS. HARDER: Thank you.

17 COMMISSIONER DOMBROWSKI: Mr. Rankin, I think it
18 would be -- bring your witnesses up, and I guess we will
19 shift to this -- well, both this proposal and
20 Commissioner Broad's proposal, and hear your comments.

21 COMMISSIONER BOSCO: Mr. Chairman, I wonder if
22 we can limit the testimony, really, to language and more
23 technical things than just people that support or don't
24 support in general, because we've had hearings on the

1 general nature of this.

2 COMMISSIONER DOMBROWSKI: Are you okay with
3 that?

4 MR. RANKIN: Well, let me just start out with a
5 basic procedural question.

6 We are faced here with something that I was
7 handed at 10:25 this morning, which I was told was a
8 document which amended the document that is -- was in
9 your agenda and was given to the public a month ago, on
10 April 25th. So -- and most people here got this at 11:05
11 this morning.

12 Anyway, this was supposed to be -- with the
13 underlined changes on this document -- I'd like you to
14 both -- all the commissioners take these out and put them
15 side by side. This was portrayed as being an amendment
16 to what was in your agenda.

17 COMMISSIONER DOMBROWSKI: It was not -- it was
18 not supposed to be an amendment.

19 MR. RANKIN: The underlined -- the underlined
20 portions were portrayed as being amendments. They're
21 totally different documents. This is in no way an
22 amendment to what was on your agenda today.

23 How -- look, we have people here from the
24 hospital industry saying, "We can't have all these

1 election procedures with the Labor Commissioner and
2 everything." How in the world do you think workers are
3 supposed to trust their private employers when this is
4 the way a public body operates?

5 We need all the protections we can get!

6 (Applause)

7 MR. RANKIN: What I would suggest is that you
8 simply put this item over. We have had no time to
9 analyze this document. We got it a few minutes ago. And
10 we're -- we are opposed to a lot of it. But what it
11 mainly lacks is the protections that are in the document
12 that's on your agenda for today.

13 So what do you want to do? How do you want to
14 proceed on this? I would suggest that you put this item
15 over to a future date when it can be rationally
16 considered. I mean, how can you make -- how can you make
17 regulations in this fashion? It's beyond me.

18 COMMISSIONER DOMBROWSKI: Let me address that
19 that was not presented as an amendment to what was
20 circulated. It was an -- it was a document I had
21 drafted, which I believe I gave to Commissioner Broad at
22 some, and the other commissioners earlier, internally
23 with my thoughts.

24 Also, let me suggest that there have been

1 discussions this week between you and your
2 representatives and the hospitals that I think covered a
3 broad range of issues, all of which we are talking about
4 today.

5 MR. RANKIN: Yeah. The discussions we had, we
6 had discussions totaling less than four hours with
7 representatives of the hospital industry. And we didn't
8 even get through a complete list of issues when they gave
9 up. That's the discussions that were held.

10 COMMISSIONER DOMBROWSKI: Other comments?

11 MR. RANKIN: Well, I -- I would like an answer
12 about the procedure. I mean, it just seems --

13 COMMISSIONER DOMBROWSKI: I want to hear
14 comments on both proposals. I want to hear --

15 MR. RANKIN: At this particular time, you want
16 to put us in the position of responding to a proposal
17 that we got --

18 COMMISSIONER DOMBROWSKI: I don't think there's
19 anything -- I don't think there's anything in there that
20 we haven't discussed in general terms over the last three
21 or four months, and what we've been looking at. I don't
22 think there's anything in there that way. I think you
23 are -- you can prepare -- you can respond to that. You
24 can advocate for the proposal Commissioner Broad

1 proposed.

2 What I would hope to do, quite frankly, is to
3 come to some resolution today, because I do not want to
4 put the industry in a position of being two days before
5 their exemption expires when we finally adopt.

6 COMMISSIONER BROAD: Mr. Chairman, I just have
7 one question. I -- there are provisions in this that
8 actually seem to remove stuff that was in -- that we
9 already adopted in the interim wage order, and modifies
10 the interim wage order.

11 I -- I -- what makes me uncomfortable about this
12 document is that -- I guess what I would like to see is
13 some kind of a side-by-side comparison of the two so that
14 you can catalogue all the differences and not all the
15 differences so that we would know what we were voting on.
16 That's the problem here. We --

17 COMMISSIONER DOMBROWSKI: I'm sorry. Which
18 document changes the interim wage order?

19 COMMISSIONER BROAD: Well, for example, just --
20 unless I'm missing something, we adopted a provision --
21 your document, your proposal -- we adopted a provision in
22 the interim wage order that said if you have someone in a
23 regularly scheduled alternative workweek and the employer
24 simply sends them home early on that day, that they are

1 paid time and a half for hours in excess of eight on that
2 day.

3 COMMISSIONER DOMBROWSKI: I don't think it's
4 been changed.

5 COMMISSIONER BROAD: Well -- I don't see it.

6 COMMISSIONER DOMBROWSKI: It's (B). Isn't that
7 (B)?

8 COMMISSIONER BROAD: No.

9 MR. HOLOBER: Mr. Chairman, can I make a
10 comment? I'm sorry.

11 COMMISSIONER BROAD: Oh, that's right. No, it's
12 there.

13 COMMISSIONER DOMBROWSKI: One second. One
14 second.

15 COMMISSIONER BROAD: Well, anyway -- you're
16 right. I'm sorry. But that's the -- I mean, I sort of
17 looked through it and missed it, but I don't know what is
18 in here. I don't know whether we should have some effort
19 to -- and we've got all day -- to produce some kind of
20 side-by-side thing.

21 What I'm concerned is, is we have to -- if --
22 let's say -- there's probably a lot in each of these that
23 are the same, and I -- I -- and there's a lot -- and
24 there are things that are different. It's putting them

1 side by side. You have no idea what's the same and
2 what's different and what the import is of that, plus I
3 had a sort of a third proposal, by way of compromise,
4 that I had our executive director send to you all
5 yesterday. And so, the -- you know, that's yet another
6 possibility.

7 And I think that it just seems like we ought to
8 -- to proceed in an orderly manner, we really should have
9 these things sort of lined up so that we know what we're
10 really dealing with.

11 COMMISSIONER DOMBROWSKI: Richard?

12 MR. HOLOBER: Yeah, Mr. Chairman. Richard
13 Holober, with the California Nurses Association.

14 I think there really is a problem with receiving
15 something this late and, you know, there's no time to
16 review it and really scrutinize it. And, you know, I
17 know, whether it's in the bargaining -- collective
18 bargaining process or in front of the Legislature, you
19 know, when someone tries to do that -- and I'm not -- I'm
20 not saying someone's trying to, you know, slip something
21 through -- it immediately sends up red flags. And, you
22 know, the first thing you've got to do is say, "Wait,
23 let's stop and let's spend whatever reasonable time is
24 necessary to really do a line-by-line review."

1 We did -- you know, my organization did that
2 with Commissioner Broad's proposal. We're here to -- you
3 know, prepared to comment on his proposal. If -- if --
4 if there's any consideration of doing something other
5 than adopting or modifying his proposal, I would caution
6 this Commission from moving without, you know, the proper
7 diligent review that's required.

8 COMMISSIONER BROAD: Mr. Chairman, let me just
9 say this in defense of Chairman Dombrowski. What we had
10 hoped --

11 COMMISSIONER DOMBROWSKI: Indefensible.

12 COMMISSIONER BROAD: What we had hoped was that
13 by putting labor and the employers together, that they
14 would, taking the document proposed, come to some
15 compromise. And we waited and waited and waited. And
16 that -- until the time expired. And now, maybe that was
17 a -- a mistake in the sense that we were perhaps too
18 hopeful that such an outcome could occur. However, I
19 don't think we should give the impression here that the
20 chair is intending to sort of pull a fast one, because I
21 don't think he is.

22 And nevertheless, the lateness of these various
23 proposals does raise, I think, a sort of question about
24 how we proceed in an orderly fashion.

1 COMMISSIONER BOSCO: Could I ask a question of
2 our counsel? If we -- I believe that there always is a
3 moment of truth in passing any kind of legislation or
4 regulations, that you'll never get to a point where
5 everybody has seen everything and everyone is agreed on
6 everything, and we could go on and on and on with this
7 language. This is very technical, and I don't think
8 we'll ever get to the point where everyone understands,
9 to the extent they all want to, everything that is
10 presented or comes before the Commission.

11 But -- so my inclination is to move ahead and
12 vote on what this Commission's policy will be in these
13 general areas. However, what my question is, if we were,
14 for instance, to vote on Mr. Dombrowski's language, would
15 we have the opportunity to amend in a technical sense
16 this language before the July 1st deadline?

17 MS. MOSLEY: There's another hearing scheduled
18 for -- oh, sorry -- there's another hearing scheduled for
19 June 30th, I believe.

20 COMMISSIONER BOSCO: So if some egregious
21 mistake were made or if -- in other words, if we were to
22 pass this, and all the various parties go home and look
23 it over, and their lawyers look it over, and find things
24 that, you know, in a technical sense, vary from perhaps

1 what we've already agreed to, we would still have one
2 other opportunity to remedy those matters.

3 MS. MOSLEY: Yes.

4 MR. RANKIN: Well, let me just --

5 COMMISSIONER BOSCO: I'm not saying that that's
6 necessarily what we will do, but we would have the
7 opportunity.

8 MR. RANKIN: Well, our objections to the
9 Dombrowski proposal are very extremely substantive. They
10 are not technical exemptions -- problems with it. You
11 know, there are -- there are tremendous changes to what
12 he's -- differences between what he's proposing and what
13 the public has been looking at here for the last month.

14 Let me just go over the basic -- where we're
15 coming from on this.

16 The Legislature passed AB 60 last year. And
17 there -- in passing it, they adopted very strong language
18 about their view of the 8-hour day as a basic protection
19 for California working people. They also allowed you to
20 look one more time at the 12-hour day in the healthcare
21 industry and decide whether or not it should be
22 continued, whether or not it should be changed, more --
23 there should be more limits put on it. And our position
24 is that, given the Legislature's strong position in favor

1 of the 8-hour day, when you look at doing something other
2 than the 8-hour day, you'd better look at it very
3 carefully.

4 Now, we're willing in this one industry, after
5 long deliberation amongst ourselves, to go for a 12-hour
6 day. And for that, we expect a no mandatory overtime
7 provision, we expect very strict and fair election
8 procedures, we expect that these folks are not going to
9 be required to work long times in -- we expect at least
10 two consecutive days off for these folks, and some other
11 restrictions on the use of the 12-hour day. That's where
12 we are coming from on this issue.

13 So the differences between the proposal that was
14 in your agenda today, which basically reflect our views,
15 not entirely on everything, but we could go with that,
16 and what we got at 10:25 this morning are huge. They're
17 substantive differences. They are not technical
18 differences.

19 What you -- what you -- what we got this morning
20 does have something on no mandatory overtime. It
21 contains an -- a clause that makes the whole thing
22 meaningless, for instance. It -- it does not at all
23 restrict -- and you've had testimony here for many
24 meetings about parts of the healthcare industry that may

1 deserve a 12-hour day with restrictions. But then, what
2 you're proposing here is to give it to everyone under the
3 sun, laboratories, dispensaries, doctors' offices,
4 dentists' offices, patient homes. You never got
5 testimony on that stuff.

6 COMMISSIONER DOMBROWSKI: We could cite the
7 correspondence.

8 MS. CANFIELD: Glenda Canfield, SEIU.

9 I would echo Mr. Rankin's comments. We were
10 handed this document about fifteen minutes ago. And we
11 came today, having met with the industry for about four
12 hours. We requested to meet with them again yesterday,
13 and we were informed that they needed yesterday to
14 prepare for today. So, in a sense, we have had a very
15 short time even to meet with the industry over many of
16 these issues. Many of the -- many of the issues in Mr.
17 Dombrowski's proposal are very substantially different
18 than Mr. Broad's. And we would -- we came today prepared
19 to address Mr. Broad's proposal. And we would request
20 that these proposals be formatted in a way that could be
21 -- that they could be adequately reviewed and compared.

22 MR. HOLOBER: Could I comment on some of the
23 substance -- Richard Holober again -- with the
24 understanding that I really haven't been able to digest

1 this, so I think, with some more time, I'd be able to,
2 you know, give a better response to this? Let me just
3 address a few of the issues, because I don't know where
4 you -- where you're going to go today as a Commission, so
5 I think at least you want to understand our position.

6 And, you know, we have stated in writing the
7 position of CNA regarding overtime, and our position is
8 very clear, which is that nurses know best when they have
9 reached the point that they can no longer perform at the
10 quality of care that they are required to give to their
11 patients and that their licenses require.

12 We have a -- we have nurses caring for more and
13 more patients in California. We have, in fact, the
14 second worst ratio of staffing of nurses to patients in
15 the nation, which means that nurses are being pushed
16 harder and harder. The work they do is extremely
17 stressful, both physically and mentally, because they are
18 involved in making decisions and administering care to a
19 number of patients. This requires a lot of judgment.
20 And at the end of a shift, if a nurse feels that she,
21 either for a reason of exhaustion or mental fatigue, or
22 because of another personal commitment, cannot work
23 overtime, that that nurse should have the right to say
24 no.

1 Now, what's in -- and that would apply to anyone
2 on any shift of any length, whether they've agreed to an
3 8-hour or 10- or 12-.

4 What Commissioner Broad's proposal appears to us
5 to be is an attempt at a compromise. There's no other
6 industry in California that is regulated that allows for
7 longer than a 10-hour day without overtime pay, with one
8 exception, and that is the mining industry. And, in
9 fact, in that industry, if you have a 12-hour day, you
10 are literally legally prohibited from working longer than
11 12 hours. That's it, 12 hours, period.

12 There's no other industry that allows you to go
13 12 hours without overtime. So the healthcare industry is
14 getting something here that is unique.

15 And it's about money. When nurses work 8-hour
16 shifts, part of what they're doing on their job is either
17 giving or receiving a report from the other shift. So,
18 in an 8-hour day, you're going to spend a half hour,
19 typically, receiving a report and a half hour giving a
20 report to the next shift. Okay. The math on this is
21 very simple: three shifts a day, one hour of each
22 nurse's time giving report, the hospital is paying for
23 three hours of reporting time. If you have two shifts a
24 day of 12 hours, there are two hours spent. That means

1 that the hospital has saved the equivalent of one hour of
2 pay during which time a nurse would be reporting rather
3 than doing other duties. That's roughly 4 percent of a
4 payroll cost savings to that hospital. I mean, that's
5 what this really is all about. And that's why the
6 hospitals are so interested in having the 12-hour day.

7 Now, we accept that in California, you know, the
8 12-hour day has become part of the landscape in
9 hospitals. And we are okay with the proposal that would
10 allow for a 12-hour day, with an election, with a secret
11 ballot, with some safeguards. And AB 60 did clearly
12 direct the Industrial Welfare Commission to develop
13 safeguards to assure that these elections are conducted
14 fairly.

15 Commissioner Broad's proposal does address
16 establishing some safeguards, like having neutral parties
17 conduct elections, and so forth, which we think are
18 proper. But the other thing that is embodied in his
19 proposal, I think, is the recognition that, in effect, if
20 the hospital is getting something that no other industry
21 is getting, and they are asking a nurse or another
22 employee to vote for a 12-hour day, that that employee
23 should at least know that when they're signing up for
24 that deal, that when they're voting for that deal which

1 is a highly unusual work arrangement in the State of
2 California, that at least when that shift ends, they can
3 say, "I've had enough, I don't feel that I can continue
4 to perform at the peak level required to deliver safe
5 care to my patients, and I don't want to work any longer,
6 and I should have the right to not work any longer."

7 This is such a huge issue for our organization
8 that this has been a major demand at the bargaining table
9 in our current round of negotiations. And we have, in
10 the past year, negotiated contracts covering about 5,500
11 nurses in California in fifteen hospitals that banned
12 mandatory overtime. And I spoke yesterday to the
13 director of our Acute Care Division who negotiated these
14 contracts, and I asked him, "Have we had any complaints
15 from hospital management in any of these fifteen
16 hospitals where there is a strict prohibition on
17 mandatory overtime?" And he told me that they have not
18 had one complaint.

19 These -- these contracts have been in place, on
20 average, about eight to ten months. So, during that
21 time, there's been, you know, an opportunity to observe
22 and learn whether or not this is a problem for a
23 hospital. It is not a problem for a hospital. We have -
24 - you know, we would know. We would be getting

1 complaints if this was an issue.

2 What this does, in fact, is make an employer do
3 a better job of managing. It means that they have to
4 staff properly, they have to plan properly, they have to
5 have contingency plans, so that they are doing their job
6 to make sure they have proper coverage.

7 What I saw in both -- I don't know if it's
8 Commissioner Dombrowski's proposal or the hospital
9 industry proposal, but basically, what I see in that
10 proposal is an enormous loophole that says any nurse --
11 chief nursing officer or other executive can make a
12 declaration in that hospital that there's some special
13 condition there that allows them to require people to
14 work overtime. Now, our contracts do have language that
15 allow for an exemption if there's a state of emergency
16 declared by state or federal or county officials. That
17 means there's a healthcare crisis in that community. And
18 under those conditions, we would agree that a nurse could
19 be required to work overtime, because they have a
20 responsibility to patients.

21 Our contracts also state that before calling
22 someone in or requiring somebody to continue to work even
23 in that emergency, the hospital has to exhaust other
24 efforts, such as recruiting volunteer employees to work

1 overtime, calling employees who are off duty to see if
2 they would volunteer to come in, using registries and so
3 forth. There are lots of other ways you can staff in an
4 emergency. But if they've exhausted those options, then,
5 as a last resort, we would agree, in a genuine emergency
6 recognized by some authority other than the boss, that
7 mandatory overtime, you know, would be a reasonable thing
8 to expect of someone.

9 So, we have -- you know, this is a very major
10 issue. There was a strike last -- settled last month in
11 -- last week in Massachusetts, the first nursing strike
12 in fourteen years in the State of Massachusetts, and
13 there was one issue on the table, mandatory overtime.
14 And the -- and the nurses there who do work a 12-hour
15 shift won a severe restriction. I think, under their
16 agreement, the employer can, on four occasions during the
17 year, say, because of some unpredictable circumstance in
18 that hospital, they can require someone to work overtime.
19 But it is a very, very severe limitation on their right
20 to otherwise have people work overtime.

21 So, this language is much, much too permissive
22 in terms of allowing a hospital administrator to just,
23 you know, make a declaration and, in effect, waive
24 workers' rights to be able to refuse overtime.

1 You know, I -- a couple other issues that could
2 be real problems here, the definition here appears to be
3 very, very broad in terms of who's in the healthcare
4 industry. It appears to go way beyond what was in the
5 old wage orders, clearly goes way beyond what we had
6 heard was always the issue for the hospitals, which was
7 continuity of care.

8 Now, we don't think that that's really what this
9 is about for the hospitals, that it's really about money,
10 but if we're talking about continuity of care, then we
11 should restrict this to those employees who are direct
12 patient caregivers. This is way, way beyond. It's
13 pretty clear to me that this is about saving money,
14 because when people work longer hours without overtime,
15 the boss saves money.

16 You know, the other issue that I know is
17 addressed in the hospitals' -- let me ask you -- is the
18 hospitals' proposal in front of you, or is that not on
19 the table? Because they had other stuff in there which I
20 think goes back to the old '93 wage orders, which is
21 clearly unlawful under AB 60.

22 COMMISSIONER DOMBROWSKI: What we're -- what
23 we're looking at is the document I believe you have which
24 has my name on the top --

1 MR. HOLOBER: Okay.

2 COMMISSIONER DOMBROWSKI: -- with the underlined
3 proposed amendments that I've already agreed I would
4 incorporate.

5 MR. HOLOBER: Okay. And I didn't see --

6 COMMISSIONER DOMBROWSKI: And Barry's proposal.

7 MR. HOLOBER: I didn't see in here the kind of
8 peculiar definition of "primarily engaged in" that I saw
9 in the hospitals' proposal, so I assume it's not in
10 there. Okay. Thank you.

11 So, you know, those are a couple of key issues.
12 I think there's another issue on the table which -- AB 60
13 stated that if you're working a 10-hour day under a
14 secret ballot vote that occurred before, you know, 1998,
15 that those were grandfathered. AB 60 also said that if
16 you're in the hospital industry and if you're working a
17 12-hour day under a pre-1998 secret ballot election, that
18 those were grandfathered until July 1st of 2000. The
19 grandfathering should end on July 1st of 2000. The law
20 is very clear on that. They have the opportunity to
21 revote people. These are always employer-initiated
22 votes.

23 Thank you.

24 MS. GATES: My name is Patricia Gates, and I'm

1 with the law offices of Van Bourg, Weinberg, Roger, and
2 Rosenfeld.

3 And like the others sitting here at the table
4 today, I received Chairman Dombrowski's proposal about
5 midway through --

6 COMMISSIONER DOMBROWSKI: Excuse me. Can I make
7 a -- I just want to make a point of order, because it's -
8 - I don't want to keep hearing -- repeating, so let me
9 just cut through something here.

10 If you take my proposal in front of you and you
11 take the first page, all of these items are in the
12 interim wage order.

13 If you go to Page 2, Item (F) is in the interim
14 wage order, Item (G) is based on the statute, Item (H) is
15 in the interim wage order, and Item (H)(5) is in the
16 statute.

17 If you go to Page 3, we have -- the definitional
18 is simply a disagreement -- I mean, that's -- Barry has
19 his definition proposal and mine has my definition
20 proposal.

21 Item (I) is in AB 60. Item (J) in mine is, I
22 believe, similar to Barry's.

23 MR. RANKIN: Which (J)? You have two (J)'s.

24 COMMISSIONER DOMBROWSKI: The top (J) is Barry's

1 and the bottom (J) is my counterproposal.

2 Item (K), I believe, is from Barry's, top (K).

3 And the bottom (K) is my counterproposal.

4 Election procedures, these are all the existing
5 wage orders, (A), (B), (C), (D). And (E) is from the
6 interim wage order. (D) is from the existing orders.

7 Administrative -- the section on the
8 administrative is simply the language from the interim
9 and the current statute.

10 And the meal periods -- meal periods, that --
11 that's going to have to come out, actually. Yeah, we'll
12 amend that. We'll amend that one out.

13 Meal periods is from the existing wage orders.
14 So just -- I know that's a lot to throw at you, but I'm
15 just trying to put a comparison in place for you.

16 MS. GATES: No, I -- I -- Commissioner
17 Dombrowski, I appreciate you explaining the document, but
18 what my concern is, is that we -- we heard from the
19 healthcare industry, but one of the concerns I have is --
20 I work at a law office that represents more than two
21 million workers statewide -- and when presented with
22 something that -- that's new, I really have a duty to
23 them to read it side by side with existing law and with
24 AB 60.

1 What I -- what I feel concerned about is that,
2 while we've had lots of testimony from the hospital
3 industry, if you look at Page 4 of -- of your proposal,
4 and I think that if I looked at the Broad proposal, I
5 might find that it's the same, but I -- but I don't have
6 time to do that right now. I'd like more time to do
7 that.

8 But what I'm concerned about is that this
9 proposal will affect all workers in the state, because
10 we're actually making these amendments to every single
11 wage order, as I understand it. We're not just making
12 these amendments to Wage Orders 4 and 5. Is that
13 correct?

14 When we're undertaking something this serious,
15 we're affecting the rights of millions of workers in this
16 state. It's too -- I think it's just too rushed of -- of
17 an effort here, and I think we need some -- just some
18 time to read these side by side.

19 I noticed, just at first blush, that one of the
20 differences -- and again, these may be differences that
21 can be explained, but the Dombrowski proposal adds
22 administrative, executive, and professional employee
23 exemption at Page 5 -- and the pages aren't numbered, but
24 I've numbered them with my pen -- and in "Meal Period,"

1 at Page 6, that weren't part of the -- of the proposals
2 contained in the noticed document and the one that we had
3 an opportunity to review in detail.

4 I feel, at this stage, I would -- I could not
5 testify on the new document. I was prepared to testify
6 on the -- the Broad proposals that were part of the
7 noticed document that went out to the public one month
8 ago. But I
9 -- I do not feel prepared at this time, at this moment,
10 to testify as to the new proposal that I received just a
11 few minutes ago.

12 MS. CANFIELD: Glenda Canfield, SEIU. I would
13 like to echo those comments.

14 In the brief period that I had to review Mr.
15 Dombrowski's proposal, I have quickly noted that there's
16 not even a guaranteed meal period in here for a person
17 who's working 12-hour shifts and who may be working up to
18 -- who knows how many hours? If there's no mandatory
19 overtime, how many hours could a person be potentially
20 working? On Page 6, I don't see -- and I have -- and I
21 admit, I quickly reviewed this in the last few minutes --
22 I don't see any guaranteed meal break for a person
23 working that number of hours.

24 We represent many, many nurses, and I talk to

1 many, many healthcare workers across this state who tell
2 me that they're working long, long hours without meal
3 periods, without even -- without any type of break. And
4 in asking people -- you're asking people to give up
5 overtime, but this also asks them to give up a meal
6 period.

7 The other issue that I would like to address in
8 Mr. Broad's proposal, and the reason that we support it,
9 is because it helps protect healthcare workers in
10 elections. As a registered nurse and an instructor for
11 other nurses and other healthcare workers around the
12 state, I have many opportunities to talk to healthcare
13 workers, organized and unorganized workers, who tell me
14 that they are basically given a document to sign and
15 instructed that they can either volunteer to work 12-hour
16 shifts without overtime or they can seek other
17 employment. And I have too many healthcare workers give
18 me this -- the same story to -- to completely disregard
19 it.

20 Admittedly, that does seem -- that does seem
21 kind of extreme, but I have had this -- this reported to
22 me many, many times. And so, I think that protections in
23 elections for healthcare workers and oversight of a
24 neutral third party is absolutely essential. And I think

1 that any employer who wants to ask healthcare workers to
2 give up overtime after 8 hours should be willing to
3 expend the extra energy to find a neutral third party.

4 And I know, as we met with the industry in the
5 last couple days, even with the industry we explored many
6 ways to develop a broad list of criteria that could be
7 used for neutral third parties to make them readily
8 available to oversee these elections.

9 But I think this is an absolutely critical part
10 of Mr. Broad's proposal and certainly, I don't see, in
11 the short time that I've had to review it, I do not see
12 in Mr. Dombrowski's.

13 COMMISSIONER BROAD: Well, let me make this
14 comment to the chair.

15 While he's gone through things that compare his
16 proposal to the interim wage order and to some portions
17 of the proposal that were noticed, there's a whole bunch
18 of things that were in the -- my proposal that simply are
19 not present.

20 For example --

21 COMMISSIONER DOMBROWSKI: Oh, I understand.

22 COMMISSIONER BROAD: Right. But -- but, I mean,
23 I think it's worth discussing those.

24 You know, for example, my proposal suggests that

1 an employee who does work overtime that's on a 12-hour
2 shift be entitled to 8 consecutive hours off duty in that
3 day to prevent an employer from requiring someone to work
4 48 hours in a row without any rest, which I think is --
5 would be extraordinarily bad, and to which I don't think
6 the employers particularly objected.

7 And there are a number of provisions that deal
8 specifically with these 12-hour shifts, for example, the
9 requirement that there be not less than one off-duty meal
10 period for a person working on a 12-hour shift. Someone
11 working 12 hours should be guaranteed time to eat during
12 the day. And I don't know that any -- the employers have
13 objected to that.

14 So, I think that we should debate this matter
15 very fully so that we really understand not only what is
16 present in the chairman's proposal, but what is absent as
17 well, because I think there are many issues in there that
18 I do not believe are matters of significant controversy
19 at all.

20 COMMISSIONER BOSCO: Well, Mr. Chairman, I -- I
21 don't disagree at all with Commissioner Broad, and I
22 thought that was what we were going to do today. I mean,
23 I think it's good to have more testimony, but it should
24 be really limited to very -- to the technical aspects of

1 this language. And then, we as a Commission can go over,
2 paragraph by paragraph, what we intend to vote on. And
3 Commissioner Broad can raise any of these issues. And I,
4 for one, have some language changes that I've been noting
5 all the way along. But at some point, we have to come
6 back to the Commission and -- and vote on these things.

7 I mean, I -- with all due respect, I understand
8 that people have clients and others that may not have
9 read every word of this or understand different aspects
10 of it, but at some point, this Commission has to bite the
11 bullet and go through it and vote -- vote on it.

12 We cannot meet during the week together --
13 that's part of the problem here, you know -- to hammer
14 out these things ourselves. So we have to do it in
15 meetings like this. And I'd just suggest that we go
16 ahead and do it.

17 MS. BAYER: I'd like to speak, if I can. Debbie
18 Bayer. I'm a nurse at -- registered nurse and I'm a
19 secretary of the California Nurses Association.

20 There are -- there are way more than technical
21 differences.

22 The provision for no mandatory overtime in Mr.
23 Dombrowski's proposal really says no mandatory overtime
24 unless the employer wants to do it because he feels he

1 needs to. And that's ridiculous. I mean, I don't want
2 to be disrespectful, but, you know, unless they feel like
3 their overall operational status and staffing means that
4 they have to, and so they always feel that it means that
5 they have to. This is a huge issue for nurses.

6 And what I originally came here to do was to
7 speak to Mr. Broad's proposal, which I thought failed, in
8 two respects, to give enough. One was mandatory overtime
9 is unsafe after any shift, after 8 hours or after 12
10 hours. We work -- we work different shifts. You might
11 have a nurse who comes at 3:00 p.m. expecting to work
12 till 11:30, and that's an 8-hour shift. But she might
13 have been up at six o'clock in the morning with her
14 children and spent a day of work at home before she took
15 her kid to daycare and then came to work. We're talking
16 -- you have no idea -- an employer has no idea, when they
17 tell somebody that they have to stay an additional 8
18 hours or more, how long they've been up and what they're
19 capable of. Only the worker knows what they're capable
20 of.

21 And in an industry where people's lives are
22 depending on your ability to think, this is a wrong thing
23 to do. And also, it's an abuse of, really, the
24 employees' rights, any workers' rights, to be told -- if

1 I, at this point, locked the doors and didn't let people
2 leave here for 16 hours, I would be arrested for
3 kidnapping. And yet somehow we think it's okay for an
4 employer to treat a worker that way, just because that
5 worker is in his employ. We are not serfs; this is not a
6 feudal system. We voluntarily agree to work certain
7 shifts. If I don't show up at that shift, I can be
8 terminated. I don't see why I owe my employer more than
9 what we contracted between each other to work.

10 Now, this does not mean that nurses don't
11 already work hundreds of hours of voluntary overtime. In
12 1998, we put in an information request in our hospital to
13 see how much overtime we were working, and at Children's
14 Hospital, Oakland, where I work, we were collectively --
15 the registered nurses in my hospital -- in one year
16 worked 20,800 hours of overtime. Most of that was
17 voluntary. We put in lots of voluntary overtime.

18 Mandatory overtime only occurs when everybody is
19 so burned out by working voluntary overtime that they can
20 no longer continue. And it is not a rare occasion, as a
21 hospital. I heard -- I heard Mr. Luevano say several
22 times, at this meeting and at previous meetings, that
23 there's maybe a few bad apples and it hardly happens. I
24 think you'd be hard-pressed to find a hospital in this

1 state where mandatory overtime is not a big problem.

2 So, I would say that instead of Mr. Dombrowski's
3 language -- and we could even improve on Mr. Broad's
4 language, although I really appreciate the effort he made
5 -- is to say that no healthcare worker has to be ordered
6 -- should be ordered to say, unless there is an
7 emergency. An emergency is an unexpected disaster, in
8 the -- in the sense of fire and earthquake. And we also
9 are willing to say if there's, you know, a patient
10 coding, we don't ever walk out on our patients in those
11 situations.

12 Okay. And then the other thing I would like to
13 say -- speak to, is that if we have an election and we go
14 to 12-hour shifts, I would put in a plea that no worker
15 who is unable to transfer to a 12-hour shift lose his
16 job. It doesn't seem right to be basically, because of
17 your age, your health status, or because of maybe family
18 commitments, to lose your job, because the 12-hour shift
19 is just that, it's an alternative work shift. The 8-hour
20 day is and should remain the standard. If you cannot
21 adapt, for whatever reason in your life, you can't adapt
22 to working 12 hours, you shouldn't be forced with giving
23 up your job.

24 And I think that more than just "the employer

1 shall make reasonable accommodation," a stronger
2 protection for a worker would be to say a worker whose --
3 the rest of his shift goes to 12-hour shifts, still has a
4 right to work an 8-hour shift. And this is not such a
5 hard thing to do.

6 I -- when people found out in my union that I
7 was coming here to speak, and it was just a couple days
8 ago, I was faxed 134 names on a petition from a couple
9 different hospitals saying:

10 "Mandatory overtime causes a decrease in
11 critical thinking, leads to significant
12 medication errors, transcription errors, and a
13 decrease in judgment. Mandatory overtime
14 affects morale and patient outcomes. The nurses
15 listed below have experienced and witnessed
16 mistakes made because employers mandated the
17 nurse to work additional hours. The RN's and
18 NP's" --

19 -- and this is at Kaiser Hospitals --

20 " -- would like to see laws that protect not
21 only the patient, but nurses also."

22 So, I want to submit this. I want to submit a
23 letter with my -- it's really just two simple provisions:
24 one, that no mandatory overtime at all, and two, that

1 workers do not lose their job if they can't adapt to a
2 12-hour schedule. And it's signed by three of the
3 officers of the California Nurses Association.

4 And also, this is just some brief testimony by
5 nurses about the effects of mandatory overtime that was
6 given at my hospital. And I just want to hand that in.

7 MR. RANKIN: Mr. Chairman, I have a suggestion
8 that might move things along, and that is that the group
9 here go through, point by point, as Mr. Bosco suggested,
10 the proposal that was -- is before us today officially,
11 the so-called Broad proposal, and basically give us our
12 rationale

13 -- give you our rationale for each of those points that
14 are covered in that proposal. And I just think that
15 might expedite things, and you might get a better
16 understanding of why we are convinced that we need a
17 proposal of this sort -- and we even have -- you know, we
18 -- this -- so you know, this proposal represents a
19 different proposal from the one that we gave to you a
20 couple months ago. There are amendments to that, to the
21 proposal we gave you. This is not a reflection of our
22 proposal. It is Commissioner Broad's proposal, and as --

23 COMMISSIONER DOMBROWSKI: Tom, I agree, if it
24 would -- it's your time, and how you want to do it --

1 MR. RANKIN: Fine.

2 COMMISSIONER DOMBROWSKI: -- but let me -- let
3 me clarify something, because you're going from the
4 proposal that was sent out with the notice, correct?

5 MR. RANKIN: Right.

6 COMMISSIONER DOMBROWSKI: Okay. Thank you.

7 MR. RANKIN: So, without necessarily spending a
8 lot of time on each section, (A) simply sets out the
9 ability of the employer to -- to, through the election
10 procedure, institute 12-hour workdays. And I don't know
11 that anyone has any problems with that. Once that -- but
12 what follows

13 -- we consider that a major concession, and what follows
14 has to be taken in that light.

15 (B), again, talks about the ability of the
16 employer, with a two-thirds vote, to institute three 12-
17 hour days, regularly scheduled workweek, within a 36-hour
18 workweek.

19 And then we go through (1) -- (1) defines who is
20 eligible for this 12-hour day. And as you will note,
21 this is a very different proposal from the proposal of
22 the chair, in terms of coverage. I know that this has
23 been subject to discussion between a couple of you, at
24 least, and that some other language was proposed which

1 would broaden this somewhat to cover a licensed 24-hour
2 healthcare facility or licensed dialysis clinic, and we
3 could accept that -- that change in the Broad proposal.

4 Number (2) simply says that if you work more
5 than 36 hours a workweek, you get time and a half, if
6 you're on 12-hour days. And I believe the Dombrowski
7 proposal only gives you overtime after 40 hours a week.
8 I can't be held to all this, because I haven't really had
9 time to scrutinize it that closely.

10 Number (3), which we thought was a good part of
11 a trade-off for a 12-hour day, guarantees that employees
12 who work 12-hour days would be getting paid -- would not
13 be getting paid less than they were getting paid for the
14 40-hour week. In other words, it's a 36-for-40 proposal.
15 In the discussions between the chair and Mr. Broad, this
16 was proposed to be eliminated, which would be a major
17 concession on our part.

18 Number (4) says that if you are assigned to work
19 12-hour shifts, you cannot be required to work more than
20 12 hours in a 24-hour period, or more than 40 hours in a
21 workweek. I believe that was missing from Mr.
22 Dombrowski's proposal.

23 COMMISSIONER DOMBROWSKI: That's there.

24 MR. RANKIN: No? That's there? Okay.

1 Number (5), if you're assigned to work a 12-hour
2 shift, you may voluntarily work an additional 4 hours of
3 overtime in the same 24-hour period, provided that you
4 are entitled to a break of at least 8 consecutive hours
5 off within a 24-hour period. And we had testimony here
6 this morning that this is viewed as essential to being
7 able to provide proper patient care. You don't want
8 people working without at least consecutive -- 8
9 consecutive hours off-duty.

10 COMMISSIONER BOSCO: Could I interrupt a second?

11 Then, Mr. Chairman, is that addressed at all in
12 your draft, this -- so I'm trying to make note of where
13 we're different and where we're the same so we can go
14 back to some of these things.

15 MR. RANKIN: That is not addressed in that
16 draft, as far as I know. It was, in terms of the -- the
17 discussions between two of the commissioners, was left in
18 the proposal.

19 COMMISSIONER DOMBROWSKI: Yeah. I don't think
20 it's in here.

21 COMMISSIONER BROAD: Yeah. Mr. Chairman, I -- I
22 believe neither Paragraph (5) nor (6) were addressed in
23 Mr. Dombrowski's proposal.

24 COMMISSIONER BOSCO: I wonder if --

1 MR. RANKIN: (6) -- (6) --

2 COMMISSIONER DOMBROWSKI: (6) is addressed as my
3 meal period language.

4 MR. RANKIN: (6) deals with the meal period
5 issue that one of the folks on the panel just went into.
6 It guarantees the second meal period and allows it to be
7 taken as an on-duty meal period, by mutual consent.

8 Number (7) deals with a situation where
9 employers have reduced hourly wage rates between the time
10 the bill was passed and January 1st, 2000, having to
11 restore the base rate of pay.

12 COMMISSIONER BOSCO: And that is included in the
13 chairman's draft? Is it?

14 MR. RANKIN: Well, now we understand how
15 difficult this is?

16 COMMISSIONER BOSCO: Where is it?

17 COMMISSIONER DOMBROWSKI: It's --

18 COMMISSIONER BROAD: I believe --

19 COMMISSIONER DOMBROWSKI: It's in Clause (K).

20 COMMISSIONER BROAD: -- it's in Clause (K).

21 COMMISSIONER BOSCO: See, I think a number of
22 these we can really go over quickly, because they're
23 already included.

24 MR. RANKIN: They may be included, but in some

1 cases they may be included with different language. So
2 you have to be cognizant of that possibility.

3 COMMISSIONER BOSCO: Are you saying that an
4 occasional change in language can cause lots of trouble
5 later on?

6 MR. RANKIN: Yes, I am.

7 COMMISSIONER BOSCO: Okay.

8 COMMISSIONER BROAD: Not for us. We've been
9 confirmed.

10 (Laughter)

11 COMMISSIONER BOSCO: Are we to be commended on
12 that or sympathized with?

13 COMMISSIONER BROAD: Not reappointed.

14 MR. RANKIN: (C) defines a regularly scheduled
15 workweek.

16 (D) --

17 COMMISSIONER BOSCO: Is that the same?

18 MR. RANKIN: -- whether or not that is in --

19 COMMISSIONER DOMBROWSKI: I have a different --

20 COMMISSIONER BOSCO: The proposal we got this
21 morning.

22 COMMISSIONER BROAD: No, that -- that -- the
23 difference there is that this says the length of the
24 shift and the days of work are predesignated, as opposed

1 to the number of days of work.

2 COMMISSIONER DOMBROWSKI: Right.

3 COMMISSIONER BROAD: So this is the question
4 that -- that the menu of options should include the days.
5 They vote on and adhere to a regular schedule that names
6 the days.

7 COMMISSIONER BOSCO: Okay.

8 MR. RANKIN: Yeah, this is a basic issue here.
9 Whether or not a regularly scheduled workweek means that
10 an employee is going to know that he or she is going to
11 work on a Monday, Wednesday, and Friday as a regular
12 schedule for a certain period of time, or whether or not
13 his or her schedule can be shifted totally at the
14 discretion of the employer so that one week, he may be
15 working Monday, Wednesday, and Friday, then the next
16 week, Monday, Tuesday, Wednesday, the next week Thursday,
17 Friday, Saturday.

18 COMMISSIONER BOSCO: But you have no objection,
19 I assume, to -- if the employee initiates wanting to
20 change this, that --

21 MR. RANKIN: No. No. And I think that was
22 provided for --

23 COMMISSIONER BROAD: That's in Section (F).

24 MR. RANKIN: -- here in (F), in (F).

1 COMMISSIONER DOMBROWSKI: Okay.

2 MR. RANKIN: Otherwise, I don't see that a
3 regular schedule means much, if all it means is you're
4 going to -- all you know is you're going to work any
5 three out of seven days a week. I wouldn't consider that
6 to fall within the dictionary definition of "regular,"
7 that's for sure.

8 Okay. We just went through -- go back to (D).
9 It talks -- basically is language from the statute --
10 talks about the menu of options and so forth. I don't
11 believe that's in the Dombrowski proposal.

12 (E) we just talked about, allowing the employee
13 to shift days.

14 (F) also allows for a -- oh, no -- (E) -- I'm
15 sorry, (E). (F) was -- (F) was what allows the shift --
16 (E) is an important one.

17 What (E) does is say that any workweek,
18 alternative workweek, that's adopted has to provide for
19 at least two consecutive days off within a workweek and
20 will provide for at least four hours of work in any
21 workday.

22 COMMISSIONER BROAD: Mr. Chair, I'd just like to
23 comment on that. That is actually the existing language
24 in Order 1, the manufacturing wage order, which happens

1 to be the one wage order where, in the one time in the
2 history of the Commission, as I understand it, where the
3 labor and employer representatives agreed on something.
4 And I happen to have been there at that time, which just
5 shows my persuasive powers.

6 (Laughter)

7 COMMISSIONER BROAD: Anyway, so that is not
8 without precedent, although, by way of compromise, I
9 would be willing to have it be two days off, so that we
10 just don't have a situation where, you know, you're --
11 you have an alternative -- a schedule where you never get
12 a day off.

13 And the "not less than four hours," I think, is
14 important because the other -- the other -- I think it's
15 inappropriate to have an alternative workweek schedule
16 that switches. You know, somebody could come to work one
17 hour for the day. I don't think it's very likely.
18 There's already provisions in the wage orders that -- for
19 show-up time, that if you come to work and the workday is
20 less than four hours, you're paid additional hours. So I
21 think it kind of makes it consistent with that.

22 MR. RANKIN: Okay. (F) we talked about, the
23 substitution.

24 (G), this deals with a situation where an

1 employee is coming in to work the regularly scheduled 12
2 hours and is suddenly told to go home. It says that if
3 they work more than 8 hours in that day, they get time
4 and a half for the hours over 8 hours and they get double
5 time for over 12 hours, which -- so -- and I don't know
6 that that appears -- I don't think that appears in the
7 Dombrowski proposal either. It's a protection against
8 employers sending people home and costing them pay.

9 (H), "An employer shall not reduce an employee's
10 regular rate of hourly pay as a result" -- I think that's
11 in the statute.

12 (I) deals with the reasonable accommodation
13 issue. We've heard from some on the panel that they
14 don't even think that this is strong enough, that
15 employees should be guaranteed the right to work 8-hour
16 days if the unit votes for a 12-hour day.

17 (J) simply protects against pyramiding. I think
18 everyone would agree on that.

19 (K) deals with the situation of an employee who
20 was voluntarily working an alternative workweek. I think
21 that's in the statute, as I recall.

22 And so, that deals -- that's the end of that.

23 Then we go on to election procedures. And the
24 (A) says that you can only have an election once a year.

1 So, if an employer calls an election and the 12-hour-day
2 proposal is voted down, they cannot have another election
3 for at least twelve months.

4 COMMISSIONER BROAD: And I'd like to add there
5 that that -- it was in the wage orders from 1976 onward.
6 It was to prevent an election a week. You know, once you
7 have an election, you -- it really becomes sort of unfair
8 for the employer to come back and say, "Well, we're going
9 to have an election every week until this thing passes,"
10 or for employees, for example, to have an election to
11 repeal it every week until -- so, it -- you know, once a
12 year, I think, is enough.

13 MR. RANKIN: Provides stability.

14 (B) simply says secret ballot election. That's
15 in the statute.

16 (C) defines a work unit, and it basically takes
17 from the wage orders a large share of the language and
18 adds the concept of sharing a community of interest
19 concerning the conditions of employment. And we feel
20 that it's very important that that language be in there
21 so that these units that vote are actually meaningful,
22 and not just a conglomeration of folks.

23 COMMISSIONER DOMBROWSKI: Just to interject,
24 though, Tom, not to -- excuse me, but I'm not going to

1 keep going back to which ones of those are in my order,
2 but a number of those are in my order.

3 MR. RANKIN: Well, the community of interest in
4 not in your proposal. So I think you just lifted the
5 language pretty much straight from the old wage orders.

6 (D) requires the employer to give employees 14
7 days' notice before an election, with written disclosure
8 about where and when the election is going to take place
9 and the effects of the shifts on wages, hours, and
10 benefits of the employee; the rights of the employee to
11 repeal; and that a neutral party be selected to conduct
12 the election, pursuant to subsection (G); and the right
13 of the employees to request a review of the Labor
14 Commissioner of the appropriateness of a designated work
15 unit.

16 What we have here -- what we have had, and it's
17 been a problem for us for years in the wage orders, is a
18 situation where the election is called by the employer,
19 the employer determines who votes, the employer
20 distributes the ballots, the employer counts the ballots.

21 Now, Mr. Bosco, I don't think you would want to
22 run for office under the circumstances where your
23 opponents had control of the election. And that's
24 exactly the situation we've had with elections up until

1 this point. And it is crucial at this time in history --

2 COMMISSIONER BROAD: They sure tried.

3 (Laughter)

4 COMMISSIONER BOSCO: Well, I was just going to
5 say, that did happen a couple times.

6 MR. RANKIN: Well, you had -- you had some
7 recourse. And that's why we put the Labor Commissioner
8 in here.

9 We put the Labor Commissioner in so, if there
10 are questions that employees feel that a unit has been
11 gerrymandered to just win the election, make sure they
12 got the votes for the 12-hour day, that can be reviewed
13 by the Labor Commissioner. There has to be a remedy.
14 There is currently no remedy.

15 COMMISSIONER BOSCO: Mr. Chairman, could I ask a
16 question here?

17 I think I -- I agree with you on that, but there
18 was some testimony, "But what about these five- or six-
19 person units all over the place, you couldn't -- you
20 don't mean that they have to have somebody come up from
21 Sacramento, do you?" I mean, maybe we could make a
22 distinction between the larger units and these little
23 mom-and-pop places.

24 COMMISSIONER BROAD: Well, what I had proposed -

1 - because I think that there is -- with all due respect
2 for Mr. Rankin, with whom I agree much of the time, in
3 retrospect, in looking at that, I think that these are,
4 after all, elections having to do with shifts. And in
5 certain circumstances, I think the testimony of Mr. Maddy
6 may be quite correct. And therefore, I had suggested, by
7 way of compromise, that rather than there be a neutral
8 party in every instance, that upon a complaint and an
9 investigation by the Labor Commissioner, the Labor
10 Commissioner might, by way of remedy, appoint a neutral
11 party.

12 I think that that would answer the questions
13 raised by the employers about imposing, you know,
14 significant costs of hiring neutrals and so forth in
15 every single aspect. I think it's a reasonable
16 compromise.

17 MR. RANKIN: Yeah, I think it's probably a
18 fairly reasonable compromise, except that you give, I
19 think, the Labor Commissioner too much discretion in
20 terms of -- I think you -- I think -- I have to find --
21 I'm trying to go through this point by point, and we
22 haven't reached that point yet -- but I think we might
23 want to have some stronger language in terms of when the
24 Labor Commissioner has to act. But let's deal with that

1 when we -- when we get to it.

2 Here, this involves the concept of notice. It
3 involves, this section, disclosure in non-English
4 languages, if a certain percentage of the affected
5 employees speak that language primarily. It involves
6 mailing the disclosure to employees who did not attend
7 the meeting that was required to be held. And if this is
8 violated, then the election would be rendered null and
9 void.

10 (E) deals with the repeal election. And a
11 significant difference here is that, under this
12 provision, a group of employees could repeal by a
13 majority vote instead of the two-thirds vote that's
14 required under the present wage orders. We think that
15 you might want to have two-thirds vote to institute it,
16 to make sure it's a popular thing, but if -- if more than
17 half of the employees don't want it, they should be able
18 to repeal it. It also sets in time limits for compliance
19 with -- with -- for holding the election and so forth.

20 (F) talks about who's eligible to vote. We want
21 to make sure, by this provision, that the employer does
22 not stack the -- the vote, so to speak, by bringing in a
23 number of employees at the last minute to vote. And it
24 seems like a pretty reasonable -- we talked -- actually,

1 this is one of the things we've talked with the hospitals
2 about. They wanted to put in the word "regular employee"
3 instead of "permanent employee." They say there are no
4 more regular -- no more permanent employees in the
5 industry, so maybe you want to think about using the word
6 "regular."

7 The -- (G) says that elections have to be held
8 during regular working hours at the work site.
9 Presently, there's no such requirement. Elections can be
10 held at midnight. And I don't think Mr. Dombrowski's
11 proposal deals with this.

12 (H) provides for a period of time to make a
13 transition from one work schedule to another after an
14 election has been held, 30 days.

15 (I) simply bans an employer from establishing a
16 work unit solely for the purposes of adopting or
17 repealing an alternative workweek.

18 COMMISSIONER BROAD: Excuse me, Tom. In my
19 discussion with the chairman -- and I want to note for
20 the record my discussion was only with the chairman, and
21 no other commissioners -- he had suggested, and I thought
22 it was a very reasonable proposal, that the Labor -- you
23 have a situation there where, based upon an employee
24 complaint, the employer investigates the appropriateness

1 of the unit. He raised the question, you know, every
2 seven days you get a new proposal, the employer never
3 gets to hold the election, and it gets to be sort of
4 dilatory. He suggested that the Labor Commissioner's
5 determination be final and binding. In other words, he
6 looks at the question of appropriateness of the unit, and
7 he or she makes that determination, and that's it.
8 That's the appropriate unit, and there's no further
9 complaint process. Do you have an objection to adding
10 that?

11 MR. RANKIN: That's probably not a major
12 problem.

13 COMMISSIONER BROAD: Thank you.

14 COMMISSIONER DOMBROWSKI: I just, to clarify
15 that, didn't get my vote, though, so --

16 COMMISSIONER BROAD: Not yet.

17 (Laughter)

18 MR. RANKIN: (J) basically talks about the
19 requirement that there be a neutral atmosphere; employees
20 shall be free from intimidation and coercion; can't be
21 discharged or discriminated against for opposing --
22 expressing opinions concerning the alternative workweek,
23 or for opposing or supporting its adoption or repeal.
24 It's basically a protection for employees who might not -

1 - who might not like what the employer is proposing and
2 might want to talk to other employees and express their
3 dislike.

4 (K) simply -- I think that is in the Dombrowski
5 proposal in some form, but probably not in exactly this
6 form -- requires reporting to the Division of Labor
7 Statistics and Research about the results of the
8 election; includes the final tally of the vote, the size
9 of the unit, the nature of the business of the employer.
10 One of the problems we've had in dealing with the whole
11 question of overtime is that there hasn't been much data
12 to look at. And this would at least provide some kind of
13 record about who's using alternative workweeks and who
14 isn't, and then someone might want to look into that and
15 figure out whether they're working or not.

16 (L) allows an employer to repeal an alternative
17 workweek based on business necessity, and if they decide
18 to do so unilaterally, they have to give the employees 45
19 days' notice.

20 COMMISSIONER BROAD: Can I just comment on that?
21 This is a proposal that actually, I think, is a
22 considerable -- adds considerable business flexibility
23 for the employer. My feeling in suggesting this is that
24 if an employer has instituted one of these alternative

1 workweek elections, and the election was held, and it was
2 passed, but it is causing tremendous stress in the
3 employer's workplace, that -- and the employer concludes,
4 "I would just like to return to the basic, standard law
5 of daily overtime after 8 hours in a day and 40 hours in
6 a week," that the employer should simply be able to
7 impose that unilaterally for business necessity reasons,
8 give the employees, you know, some notice before it
9 occurs. It's my view that it's an employer's right to
10 run the business as the employer sees fit. And if they
11 want to return to the basic statutory standard, there
12 should be no impediments placed there.

13 I realize that that somewhat obviates the result
14 of the election -- clearly obviates the result of the
15 election and allows the employer, in effect, to overturn
16 it. However, if it is not working at all in the
17 workplace, I think it would cause considerable problems
18 if the employees then consistently refused, in any
19 subsequent election, to repeal it, while the employer
20 felt that it was a nightmare, for whatever reason.

21 COMMISSIONER BOSCO: So, basically, you're
22 saying that if the employer starts to look at the world
23 the way you do, it's all right if he goes ahead and
24 unilaterally absolves everyone of their election, huh?

1 COMMISSIONER BROAD: Only if he looks at it in
2 the way the legislation established the basic standard.

3 COMMISSIONER BOSCO: Right. I was going to say,
4 you seem to have developed a new respect for employers'
5 care of their charges.

6 I'm sorry. Commissioner Broad is shocked.

7 (Laughter)

8 COMMISSIONER BROAD: Well, I could take it out
9 and try to be more consistent.

10 (Laughter)

11 MR. RANKIN: Well, one --

12 COMMISSIONER BROAD: I don't know if the
13 employers object to that in there. I mean, maybe they
14 do. I don't know.

15 MR. RANKIN: One other point. I think -- again,
16 I think that the discussions between the two of you give
17 the Labor Commissioner maybe a little too much discretion
18 in terms of requiring -- it says they "may require the
19 employer to select a neutral third party to conduct the
20 election." It seems to me, if there is a problem, a
21 violation, then the election -- the Labor Commissioner
22 should not be given discretion; they should simply be
23 required to do it.

24 One other point. We have been working on

1 language dealing with the issue of an exception to the no
2 mandatory overtime provision that we feel is so crucial
3 here. And I believe Mr. Broad has been given that
4 language, and I don't know if any -- if that's been
5 shared. But it is -- it allows for exceptions in
6 emergencies, and it sets forth restrictions so that
7 clearly -- it makes it clear that a hospital could not,
8 simply because of bad planning, require someone to work
9 overtime by arguing -- by saying, "Oh, we just don't have
10 the staff." It -- it makes it -- I think it tightens it
11 up. It's much tighter than the language that the chair
12 has proposed, which actually has a loophole in that makes
13 it meaningless.

14 So, I would suggest that, on that particular
15 element of the wage order, that you look at language that
16 explicitly takes into account emergencies, of different
17 kinds of emergencies, not just necessarily ones that are
18 declared by the state, but also protects the hospital
19 workers from a situation where, you know, at the
20 beginning of the shift, the hospital knew that -- that
21 the replacement
22 for the worker at the end of 12 hours wasn't coming in,
23 and they say, "You have to work overtime today." That's
24 not acceptable. That's not a ban on mandatory overtime.

1 COMMISSIONER DOMBROWSKI: Other testimony?

2 MS. CHINARD: Hi. Good morning. Good
3 afternoon, I guess it is now. My name is Michelle
4 Chinard. I'm a registered nurse. I work for the County
5 of Marin. I've worked there for twenty years in the
6 psychiatric emergency service. And I came today to talk
7 about mandatory overtime and the effect that it's had on
8 my life.

9 I was asked to work -- I was told to work a
10 mandatory overtime shift, which I objected to, and my
11 objections were overruled by my manager. And I have a
12 medical condition, I have fibromyalgia, which causes
13 extreme fatigue. And I was overtired after having worked
14 my 8-hour shift. It was a very, very busy shift. We had
15 a lot of very sick people in the unit. None of us had a
16 break. There were three of us on the shift. None of us
17 had a break.

18 And I had to stay and work the night shift,
19 after having worked my evening shift. And the reason for
20 this was that the -- the manager simply hadn't noted that
21 someone had called in sick two days before with pneumonia
22 and said that they wouldn't be at work that particular
23 night. And he just forgot and didn't plan for this
24 person's absence. And there was no one to cover the

1 shift other than myself. So, I stayed.

2 At about twelve and a half hours, I took a break
3 and fell asleep. And I was terminated because of that.

4 COMMISSIONER DOMBROWSKI: Any other comments?

5 (No response)

6 COMMISSIONER DOMBROWSKI: Okay. I'm going to
7 suggest that we take a lunch break. Does everybody want
8 thirty minutes? Is that enough for lunch? We get an on-
9 duty lunch period, actually.

10 COMMISSIONER BOSCO: I think we're supposed to
11 have two in a 14-hour period, aren't we?

12 COMMISSIONER DOMBROWSKI: Right. Why don't we -
13 - it's twenty to one -- why don't we say we'll reconvene
14 at one-thirty? And I would suggest various parties might
15 want to talk to each other and see if there's anything
16 else that they want to discuss.

17 (Thereupon, at 12:40 p.m., the meeting
18 was recessed for lunch.)

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A F T E R N O O N S E S S I O N

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(Time noted: 1:40 p.m.)

9

COMMISSIONER DOMBROWSKI: All right. I would
10 like to reconvene.

11

Mr. Rankin, I believe you have some more
12 representatives who wish to testify. And we have agreed
13 we would limit this section to ten minutes, and then we
14 will proceed to the commissioners deciding what next
15 steps to take.

16

MR. DAVENPORT: Mr. Chairman and members of the
17 Commission, Allen Davenport, with the Service Employees
18 International Union.

19

I should say we are the largest union of
20 healthcare workers in California, and we represent a
21 broad diversity of healthcare workers in a -- in a great
22 many places. But I'm not a healthcare worker; I'm a
23 lobbyist. I've been a lobbyist since Mr. Bosco was chair
24 of the UIDI Subcommittee, which used to meet sometimes in

1 this room when it had walnut paneling.

2 As such, I -- I've had experiences like this
3 before, where somebody comes in with forty pages of
4 amendments to a proposal and you haven't had a chance to
5 see it, and I know how these things can happen. But I
6 would caution the Commission that when the Legislature
7 said re-examine the healthcare industry, that it meant
8 for you to do that because there was not a great deal of
9 consensus that the existing system for creating
10 alternative workweeks was at all satisfactory. And I
11 think the testimony that we've presented here and at
12 previous hearings should cause you to -- to want to
13 create a substantial reform in a number of areas,
14 including the elections.

15 I would like to enter into the record just one
16 example of how elections can be rigged in healthcare
17 systems. This is the report on the employees' election
18 to form a union at Catholic Healthcare West. This is an
19 NLRB oversight election. And this commission that was
20 established by the speaker of the Assembly, with a lot of
21 reputable people from this community here, found
22 violation after violation of employees' rights. And
23 that's this report.

24 The second thing that happened was that the

1 National Labor Relations Board looked into this election
2 and found lots and lots of violations. Nevertheless, the
3 Board didn't find enough violations to undo the election.

4 But we just want to tell you that there is a
5 bias out there on the part of the employer in these
6 elections, and the idea that the election can be run by
7 the employer in a fair way is just not simply -- doesn't
8 meet the test of trying to protect the workers in the
9 workplace from the down sides of the 12-hour shift.

10 And so, what -- one of the fundamental things
11 that we're asking for here is fair elections overseen by
12 a neutral party.

13 A couple of other things have come up here. We
14 were not particularly, as Mr. Broad knows, satisfied with
15 everything that was in his proposal. We did view it as a
16 compromise kind of proposal. One of -- one of -- but
17 given that there is a -- obviously, another proposal here
18 now that would broaden significantly what Mr. Broad has
19 proposed, I would like to comment on a couple of matters
20 related to that.

21 One of -- one of the key elements of Mr.
22 Dombrowski's proposal is to -- is to broaden the kinds of
23 occupations that can be included, far beyond the licensed
24 personnel that Mr. Broad's proposal would have limited it

1 to. And we represent both licensed and unlicensed
2 personnel. And the licensed personnel and unlicensed
3 personnel, some of them sometimes vote for the 12-hour
4 shifts, and some of the times, they don't. But one of
5 the things that we find in these elections that employees
6 find unfair is when a certain class of people on -- in a
7 designated unit which has an interest in doing this can
8 then vote against another class of people, another
9 classification of workers, who don't.

10 And so, we're going to say -- so our proposal is
11 -- is that if you're going to get beyond licensed
12 personnel, and I don't know any reason why you should,
13 necessarily, but if you do, as does exist in some of our
14 contracts, then you ought to make sure that -- that
15 people vote by classification here. Let's not have
16 twelve nurses on a shift outvoting one janitor on a
17 shift, okay?

18 Now, I don't know any reason why janitors have
19 to have 12-hour shifts here, okay? I don't even think it
20 works.

21 But, in any case, we would say that if you're
22 going to broaden the universe of people that this is
23 going to apply to, then that's going to have an impact on
24 the election procedure that you're going to put together,

1 and you ought to take that into account. And no proposal
2 here at the moment has any account of that.

3 So, I leave that work to you.

4 The other thing I wanted to talk about was the
5 "brinksmanship" that's going on here today. I think
6 that, while we have had a lot of testimony about what --
7 some of the egregious problems regarding mandatory
8 overtime, there hasn't really been a process for
9 developing a -- a response, until Mr. Broad's proposal
10 went up on the Internet. And even then, you know, it
11 wasn't until 72 hours ago that the industry people felt
12 like they had to sit down with us. It's made me a great
13 believer in the wage board system, all right? I mean, I
14 think if we had had to have a wage board, and had to go
15 through this process, you folks wouldn't be in this
16 position today, because I -- I didn't get the feeling,
17 when we sat down with the hospital people the other day,
18 that they really cared about reaching an agreement with
19 us. I think they cared about you guys being put in the
20 position of voting for one proposal or the other. And
21 it's hard for me to think that we couldn't have done a
22 better job if we'd had a better structure here.

23 But having said that, I don't think that you
24 ought to be pressured by them into saying, "Oh, we're

1 going to have to -- you know, if you vote for Mr. Broad's
2 proposal, you know, we're all going to have to -- you
3 know, we'll have some kind of sudden death here in the
4 hospital administration as we know it." I think there
5 are ways to create transition here that you -- that are
6 perfectly within your right. I think that if you decide,
7 as we hope you do, that, on balance, Mr. Broad's proposal
8 is the better proposal, it seems that there -- you know,
9 it seems fair that there ought to be some kind of
10 transition, so that not everything has to change as of
11 July 1st. We would say that there ought to be new
12 elections in every place according to the new rules, so
13 that everybody is treated fairly, but I think we could
14 say that they -- you know, that those elections could
15 take place over a period of time.

16 I think -- you know, in other words, there are
17 ways to make this a manageable circumstance, even if you
18 create the kind of change that we think you need to
19 create to create fairness here.

20 So, I think I'll limit myself to those three
21 remarks so that other people will have some time here.
22 But I think it's important to realize that if you're
23 going to engage in what you're doing here, you're going
24 to have to take into consideration some things that

1 aren't even in front of you right now.

2 COMMISSIONER DOMBROWSKI: Okay. That took about
3 half of the ten minutes we have, folks. So, please, be
4 brief.

5 MR. ZACKOS: Good afternoon, Mr. Chairman. My
6 name is Mike Zackos, and I represent the United Nurses
7 Association of California, also a part of the National
8 Union of Hospital and Healthcare Employees, representing
9 more than 11,000 registered nurses in the southern
10 California area.

11 You've heard a lot of testimony -- I certainly
12 want to be brief -- but I -- it's our opinion that the
13 best protection for patients and healthcare workers is to
14 ensure the importance of setting safety standards.
15 Therefore, in the interests of setting general safety
16 protections, we recommend -- we strongly recommend that
17 you do not consider mandating people to work overtime.
18 We've had previous meetings before. We've identified
19 reasons why, health reasons.

20 More specifically, you've heard testimony this
21 morning about the nurse who had fibromyalgia, was
22 mandated to work overtime. She works overtime, certainly
23 taking into consideration her health condition, she fell
24 asleep at work. What happened? She got terminated.

1 Certainly she does not -- she was not in a condition to
2 provide ideal quality patient care. And certainly, I
3 believe your decision to decide to be able to mandate
4 people, other than in a national emergency or a national
5 disaster, is certainly setting yourself up to jeopardize
6 patient care.

7 Also, we certainly ask you to consider, and we
8 strongly support, two consecutive days off during the
9 week, as well as 8 hours -- at least 8 hours off after
10 the 12-hour shift.

11 We have a large proportion of nurses today who
12 certainly are making up an aging workforce. And you're
13 putting restrictions on them to work under mandatory
14 situations. And when something happens, you're placing
15 patients and the nurse at risk.

16 Thank you.

17 MR. CAMP: Mr. Chairman, members of the
18 Industrial Welfare Commission, my name is Bill Camp. I'm
19 the executive secretary of the Sacramento Central Labor
20 Council, and I come here today representing those workers
21 in the six counties here in the Sacramento area.

22 We have some very serious concerns about the --
23 the pace and the way in which this has been settled, but
24 more particularly, about the expansion of the definition

1 of who you plan to cover. We've always assumed that this
2 was simply talking about those people that had
3 essentially a job classification of nursing. And if
4 we're going to go and now expand this to include almost
5 anybody, anybody -- we're talking people that work in a -
6 - in a -- in a grocery store selling Band-aids. I mean,
7 what -- what is the -- what is the intent here of the
8 Industrial Welfare Commission in terms of trying to move
9 for the expansion of the definition?

10 Secondly, it is a real serious problem for us
11 that we're saying to workers, "You must deal with and you
12 must accept the blame for the unplanned circumstances of
13 management." To say to management that we can consider
14 this a crisis because we didn't plan very well how we
15 manage our workforce, and therefore you're going to have
16 to work a 12-hour shift, is the kind of abuse of workers
17 that we really believe that this Commission was designed
18 to prevent, not to implement, that the statutes, in our
19 minds, were created to provide the kind of minimal
20 protections from the -- this classic example of saying,
21 "We can force you to work more than a 12-hour shift
22 because we didn't plan very well how to handle the
23 circumstances we were faced with."

24 It is a serious dilemma for thousands of workers

1 in this state, not just the few that came here today.
2 And, in fact, I've got more than 400 cards that I'd like
3 to have the secretary of the Industrial Welfare
4 Commission to share, who is -- whoever's the responsible
5 party. But it includes in that several hundred letters,
6 each of which had some individual information with it
7 about the seriousness with which people consider this
8 erosion, so that what we would like for you to do is to
9 consider the fact that this is not just an issue that's
10 gone away. This is an issue which our members all over
11 the state continue today to raise as a big problem, that
12 -- what we are not asking you to do is to make an
13 immediate decision without realizing that there are
14 people everywhere who look to you for leadership, for
15 those protections.

16 What we've seen since 1973 is a tremendous
17 crunch on the standard of living for working people in
18 this state. We've seen wages go down as the number of
19 people in each family working increases by 100 percent.
20 When we tell you that there's a problem about how you're
21 going to implement these 12-hour shifts, we're telling
22 you that what you're doing is you're destroying American
23 families. You're destroying people's ability to have a
24 family life and to be engaged in the civic interests of

1 the community. And you can't do that. You can't do that
2 as those appointed with this authority to -- to protect
3 the interests of these people, without giving us some
4 careful protections, some very diligent protections from
5 abuse of this election process.

6 There's no question but what the people who have
7 the big interests here, who came to you this morning at
8 the last minute with these proposals, said, "Hey, listen,
9 we've got a grand plan here, and let's just slip it in at
10 the last minute," have a major financial interest.
11 That's not a doubt. But what we're faced with is people
12 who also have a major financial interest, and that's the
13 people that work.

14 And we're asking that you not talk about an
15 expansion of who gets covered, nor talk about people
16 being able to be given more than a 12-hour shift because
17 some employer didn't do a good job of planning. We think
18 you need to make the arrangements in the election process
19 that counterbalances or tries to level the playing field
20 between these people who are working for a living and
21 those that have a phenomenal financial interest, a
22 financial interest designed not to talk about their
23 family life or their civic engagement or their
24 participation in the community, but an interest of our

1 community. We can't afford to see our families torn
2 apart, our lives torn asunder economically, by these kind
3 of last-minute decisions.

4 What we're asking for is a considered,
5 thoughtful review of how do we protect these families,
6 how do we protect those people who are being forced to go
7 out and work these horrible shifts. You can't grind the
8 labor force down like that. You've got this whole cohort
9 of people who were born after '44 to '46 --

10 COMMISSIONER DOMBROWSKI: Bill, please -- I
11 mean, we are running out --

12 MR. CAMP: It's an aging population. And to put
13 an aging population into this kind of work -- work demand
14 is -- is the kind of abuse that the Industrial Welfare
15 Commission was designed to prevent.

16 Thank you.

17 MS. DENT: Good afternoon. My name is Barbara
18 Dent, and I'm a registered in Sharp Chula Vista, down in
19 San Diego.

20 And most of the points that I wanted to address
21 here have already been addressed quite clearly, but I
22 would just like to address one other issue, which is in
23 Mr. Dombrowski's proposal, (H), Number (5): "An employer
24 shall not be required to offer a different work

1 assignment to an employee if such a work assignment is
2 not available." To my way of thinking, this would lead
3 to broad firing of persons who were unable, for medical
4 reasons or family reasons or whatever, they would be out
5 of a job if they could not -- if they were unable to work
6 the 12-hour shift.

7 I would -- would really like to see some
8 language in there saying that employers would do
9 everything they could to accommodate people in other
10 areas, other than -- because not all of the hospitals are
11 12-hour shifts, not all the units, that perhaps employers
12 could give people who are unable to work 12-hour shifts
13 the opportunity to apply in other areas where they might
14 be needed where there is 8-hour shifts.

15 Thank you.

16 MS. OBASIH-WILLIAMS: My name is Cheryl Obasih-
17 Williams, and I'm a Tenet employee. And I do understand,
18 as a registered nurse, this would impact me if you
19 mandated me to actually stay over past my 12 hours,
20 because then it affects my license. Then the licensure
21 has to go back and look at the fact that I disobey
22 mandatory overtime, I left the patient, and therefore it
23 impacts me.

24 And I wish you'd give some careful consideration

1 to this, because I feel that the employer does not do his
2 job fairly either. He does not hire enough employees to
3 cover the shift. And then, at the last minute, they want
4 you to stay over. That's not fair to me. I've already
5 put in 12 hours. I've already worked hard, as well as my
6 other co-workers.

7 And we would just like you to have some careful
8 consideration.

9 COMMISSIONER DOMBROWSKI: Thank you.

10 MS. SWEET: My name is Carol Sweet. I'm a
11 registered nurse in Lakewood. I work for Tenet
12 Corporation.

13 I also was very pleased about the AB 60 bill
14 when it first came out. I was very impressed at how hard
15 you all worked at having all these things put into this
16 bill. However, after reading it, I realize that my
17 employer would never go for any of the proposals that you
18 have in here. And they didn't. My pay was reduced from
19 \$24.23 an hour to \$21.41 an hour, in -- on December the
20 8th. However, we were not notified until December the
21 14th.

22 But these kind of things are the loopholes that
23 I think that they will get around. All these amendments
24 are great; I think they're wonderful, and I think they'll

1 really work for us. But there are -- if you leave one
2 loophole, they'll find it.

3 I don't want to work till I'm seventy years old
4 and not be able to live. I don't think you do either.

5 I strongly urge you to consider the bill as it
6 was presented the first time around and pass it, for the
7 sake of our healthcare.

8 Thanks very much.

9 COMMISSIONER DOMBROWSKI: Thank you.

10 I'd like to just propose for the commissioners,
11 just to reiterate, on my proposal, in Section (A) on Page
12 1, Line -- one, two, three, four, five, six, seven,
13 eight, nine -- Line 10 shall include the words "scheduled
14 number of workdays." I'm simply reiterating the "number
15 of workdays" amendment.

16 In the definition -- I'm sorry I didn't have
17 this page numbered -- Page 1, 2 -- 3, "For purposes of
18 this order, the term 'health care industry' is intended
19 to cover," delete the words "but is not limited to."

20 Procedurally, on Page 5, we are not addressing
21 administrative, executive, and professional employees in
22 this -- in this docket, so that should just be deleted.

23 Commissioner Bosco, I believe you have some
24 comments.

1 COMMISSIONER BOSCO: You already addressed one
2 of the ones that I had, which I think the definition of
3 "health care industry" is overly broad, and you did take
4 out "but is not limited to," which I think narrows it.
5 And I would like to suggest taking out "either directly
6 or indirectly" as well.

7 COMMISSIONER DOMBROWSKI: Okay.

8 COMMISSIONER BOSCO: Also, back to the
9 veterinary establishments, I don't know if we have to
10 list them in here, but I think they should be included.

11 COMMISSIONER DOMBROWSKI: How about if I include
12 in the list "veterinary facilities"?

13 COMMISSIONER BOSCO: That would be fine.

14 And I had some other --

15 COMMISSIONER DOMBROWSKI: Okay.

16 COMMISSIONER BOSCO: I think of all the
17 testimony we've had. The real compelling issue still
18 exists about people that are required to maintain after a
19 12-hour shift. I think that there's been too much
20 testimony that abuses exist to pretend that it doesn't.
21 And yet, on the other hand, just about everybody has
22 agreed that in true emergency situations, to ask someone
23 to stay on isn't too far-reaching. And I think almost
24 any human being would be willing to stay on if a real

1 emergency exists. But I am not convinced that we have
2 the language that properly describes that situation. And
3 I think that you've done a very good job of attempting
4 that, and I intend to vote for this language today, but I
5 think our staff should seek assistance, maybe from the
6 Department or others that are used to enforcement, to
7 come up with language that would be more narrow and
8 really specify what a true emergency situation is that
9 would permit people to be forced to work after the 12
10 hours.

11 So, I guess what I'm saying is I don't think we
12 should open all this up to yet one more hearing, but I
13 would be amenable to proposing an amendment to this at
14 our next hearing, if we could seek help in getting
15 language that was better suited to meeting that need.

16 COMMISSIONER DOMBROWSKI: Okay. Anything else?

17 COMMISSIONER BOSCO: That's it for now, as far
18 as I'm concerned.

19 COMMISSIONER BROAD: Mr. Chairman?

20 COMMISSIONER DOMBROWSKI: Mr. Broad.

21 COMMISSIONER BROAD: I'd like to consider going
22 through the thing that was proposed on our agenda and
23 noticed to the public and determine whether various
24 things that aren't in your proposal have a majority of

1 votes today. How do you want to proceed with that?

2 COMMISSIONER DOMBROWSKI: I would have you go
3 through all of them, because I'm just going to say I'm
4 going to vote no on all of them, and -- but I'll leave it
5 up to the other commissioners if they want to have
6 individual votes or just have an up-and-down.

7 COMMISSIONER BOSCO: I don't know why I'm
8 feeling particularly in the hot seat here, but I guess
9 what would ordinarily happen is Commissioner Broad could
10 raise the particular issue, then we'd have to figure out
11 where it would fit in this, to amend it.

12 COMMISSIONER DOMBROWSKI: Right.

13 COMMISSIONER BOSCO: You'd be proposing
14 amendments to Mr. Dombrowski's text. Is that true and
15 correct?

16 COMMISSIONER BROAD: I guess that would be it.

17 I would propose, as a substitute, since there
18 was no objection, the language, first, on the first page,
19 (B)(1), that it would be:

20 " -- limited to licensed and certified healthcare
21 personnel employed by a licensed, 24-hour health
22 facility or licensed dialysis clinic, who are
23 engaged in direct patient care, or pharmacists
24 dispensing prescriptions in any practice setting

1 where they are required to engage in direct patient
2 care."

3 That would be my first suggested amendment to his
4 proposal.

5 COMMISSIONER DOMBROWSKI: Anyone have a second?

6 (No response)

7 COMMISSIONER DOMBROWSKI: I guess the procedure
8 is --

9 COMMISSIONER BROAD: If it doesn't have a
10 second, it doesn't have a second.

11 COMMISSIONER DOMBROWSKI: No second.

12 COMMISSIONER BROAD: Okay.

13 On (B)(2), I would propose as a substitute --
14 and I'm not sure which section:

15 "All hours worked in excess of 36 hours in
16 a workweek shall be compensated at a rate of not
17 less than one and a half times the employee's
18 regular rate of pay and all hours worked in
19 excess of 12 hours in a day or in excess of 8
20 hours on any workday beyond three days in any
21 workweek shall be compensated at a rate of twice
22 the employee's regular rate of pay."

23 I don't believe that there's actually any objection to
24 that anywhere.

1 COMMISSIONER BOSCO: Well, is there an objection
2 to that, Bill? Can you speak to that?

3 COMMISSIONER DOMBROWSKI: I'm -- I'm not
4 prepared to vote for it.

5 COMMISSIONER BOSCO: I'm not going to second
6 that one either.

7 COMMISSIONER BROAD: All right.

8 Next I would propose as Order -- on (B)(4), the
9 following language dealing with an exception:

10 "No employees assigned to work a 12-hour
11 shift established pursuant to this section shall
12 be require to work more than 12 hours in a 24-
13 hour period or more than 40 hours in a workweek,
14 except under the conditions provided in
15 Subsection (b). "Prior to mandating overtime
16 pursuant to this section, an employer shall
17 exhaust all reasonable staffing alternatives,
18 including soliciting off-duty employees to
19 report voluntarily to work, soliciting on-duty
20 employees to volunteer to work overtime, and
21 recruiting per-diem and registry employees to
22 report to work."

23 And then (b):

24 "An employee may be required to work

1 overtime if either of the following conditions
2 are met: 1) a state of emergency declared by a
3 county, state, or federal authority is in effect
4 in the county in which the healthcare facility
5 is located; or 2) in unanticipated and
6 nonrecurring event which imperils patient care
7 at the healthcare facility. An employee shall
8 not be required to work overtime under this
9 subsection on more than three occasions in a
10 twelve-month period."

11 COMMISSIONER DOMBROWSKI: Do we have a second?

12 COMMISSIONER BOSCO: Here again, I'm -- I
13 actually feel that the language that is proposed by the
14 chairman is not strong enough, not limited enough, and
15 should be strengthened. I think Commissioner Broad's
16 language is more along the lines of what I was thinking
17 of. But I would prefer that, if possible, an agreement
18 be reached between the parties on that and that we
19 revisit that one issue in the future.

20 So I'm not going to second your proposal,
21 Commissioner Broad, although I am giving notice, as it
22 were, that I do believe that what we have here needs to
23 be strengthened.

24 COMMISSIONER COLEMAN: I would agree. I think

1 we've heard testimony today, fairly compelling testimony,
2 in this regard. And I would agree that if we can work
3 something out more specific for the next meeting, that
4 would make sense.

5 For example, I'm not sure we know, you know --
6 we have three times listed in here. I think healthcare
7 experts would be able to give us some guidance in terms
8 of, you know, what numbers make sense and that sort of
9 thing.

10 COMMISSIONER BROAD: Okay.

11 Next I would propose, in Paragraph (5):

12 "Employees assigned to work a 12-hour shift
13 established pursuant to this section may
14 voluntarily work an additional 4 hours of
15 overtime in the same 24-hour period, provided,
16 however, that every employee shall be entitled
17 to not less than 8 consecutive hours off-duty
18 within a 24-hour period."

19 That essentially caps the amount of overtime at 4 hours
20 so that they would work a 16-hour day, maximum. Assuming
21 that they're working other 12-hour days in the same
22 workweek, it's possible that within a 48-hour period,
23 they could work 32 hours, under this proposal, as opposed
24 to 48 hours or 72 hours consecutively.

1 COMMISSIONER BOSCO: I'll second that motion.

2 COMMISSIONER DOMBROWSKI: Let's call the roll.

3 COMMISSIONER COLEMAN: Can I comment briefly?

4 COMMISSIONER DOMBROWSKI: Sure.

5 COMMISSIONER COLEMAN: If we clean up the
6 language on mandatory overtime to something that we're
7 all comfortable with, wouldn't it take care of this?

8 COMMISSIONER BROAD: I don't think so. I think
9 that's a separate issue. The question is how many times
10 they can ask for it, not the circumstances in which it
11 occurs. And I feel very strongly that employees in
12 safety-sensitive positions should have 8 hours off. For
13 example, for the past sixty years, truck drivers, pilots,
14 boat operators, other people in safety-sensitive
15 positions, have limits on their hours which require them
16 to have 8 consecutive hours off-duty, for fatigue
17 questions. And I think people in healthcare should
18 probably have the same.

19 COMMISSIONER DOMBROWSKI: Call the roll.

20 MR. BARON: Dombrowski.

21 COMMISSIONER DOMBROWSKI: No.

22 MR. BARON: Bosco.

23 COMMISSIONER BOSCO: Aye.

24 MR. BARON: Broad.

1 COMMISSIONER BROAD: Aye.

2 MR. BARON: Coleman.

3 COMMISSIONER COLEMAN: No.

4 MR. BARON: Two to two.

5 COMMISSIONER BROAD: We may have to revisit that
6 one next month, huh?

7 Okay. I would like to move on to Paragraph (6):

8 "Every employee assigned to work a 12-hour
9 shift established pursuant to this section shall
10 be entitled to not less than one duty-free meal
11 period during the shift, which may not be
12 waived. However, an employee shall be entitled
13 to a second meal period, which may be taken as
14 an on-duty meal period by mutual consent of the
15 employer and the employee consistent with the
16 provisions of this Order."

17 The purpose here is that when you have 12-hour --
18 employees on 12-hour shifts, that they do have an off-
19 duty meal period, a time which is free. Otherwise, what
20 they would be essentially required to do is work all 12
21 hours and try to catch a meal period during that time.
22 They would -- the second meal period, which is mandated
23 by law, could be an on-duty meal period.

24 COMMISSIONER BOSCO: I'll second that.

1 COMMISSIONER DOMBROWSKI: Any other comments?

2 COMMISSIONER COLEMAN: Just to clarify. So they
3 couldn't, even by mutual consent, waive one of the meal
4 periods, is what you're saying.

5 COMMISSIONER BROAD: That's correct, which I
6 think is consistent with the statute.

7 COMMISSIONER DOMBROWSKI: Call the roll.

8 MR. BARON: Dombrowski.

9 COMMISSIONER DOMBROWSKI: No.

10 MR. BARON: Bosco.

11 COMMISSIONER BOSCO: Aye.

12 MR. BARON: Broad.

13 COMMISSIONER BROAD: Aye.

14 MR. BARON: Coleman.

15 COMMISSIONER COLEMAN: I'm going to be trouble
16 today. No.

17 MR. BARON: Again, two to two.

18 COMMISSIONER BROAD: On the following page,
19 Paragraph (E), "Any" -- I would like to propose -- that's
20 on --

21 COMMISSIONER DOMBROWSKI: The other one.

22 COMMISSIONER BROAD: -- the other one, yeah.

23 "Any alternative workweek agreement adopted
24 pursuant to this section shall provide for not

1 less than two days off within a workweek and
2 shall provide for not less than 4 hours of work
3 in any workday."

4 COMMISSIONER DOMBROWSKI: Do we have a second?

5 (No response)

6 COMMISSIONER DOMBROWSKI: No second.

7 Commissioner Broad?

8 COMMISSIONER BROAD: Okay. Paragraph (F):

9 "Nothing in this section shall prohibit an
10 employer and an employee, by mutual consent, to
11 substitute one day of work for another day of
12 the same length in the shift provided by the
13 alternative workweek agreement on an occasional
14 basis to meet the personal needs of the employee
15 without the payment of overtime."

16 COMMISSIONER BOSCO: Second.

17 COMMISSIONER DOMBROWSKI: Call the roll.

18 MR. BARON: Dombrowski.

19 COMMISSIONER DOMBROWSKI: No.

20 MR. BARON: Bosco.

21 COMMISSIONER BOSCO: Aye.

22 MR. BARON: Broad.

23 COMMISSIONER BROAD: Aye.

24 MR. BARON: Coleman.

1 COMMISSIONER COLEMAN: Aye.

2 MR. BARON: It's adopted.

3 COMMISSIONER BROAD: I would like -- in the
4 section of Mr. Dombrowski's that refers to a reasonable
5 effort -- let's see -- on his first page, Paragraph (E),
6 I would like to add the following sentences:

7 "At a minimum, an employer shall give an
8 employee who is unable to work the alternative
9 workweek schedule first priority to work an 8-
10 hour shift in any department within the facility
11 where the employee regularly works, or any other
12 facility operated by the employer, provided the
13 employee meets the qualifications of this
14 position. Nothing in this section shall
15 prohibit an employer from permitting employees
16 who are unable to work the hours established by
17 the alternative workweek agreement to work 8-
18 hour shifts within the same work unit covered by
19 the agreement. An employer shall be permitted"
20 --

21 -- I believe actually this may be the same, but --

22 " -- an employer shall be permitted, but is not
23 required, to accommodate any employee who is
24 hired after the date of the election and who is

1 unable to work the alternative schedule
2 established as a result of that election. An
3 employer shall explore any available reasonable
4 alternative means of accommodating the religious
5 beliefs or observance of an affected employee
6 that conflicts with an adopted alternative
7 workweek schedule, in a manner provided by
8 subdivision (j) of Section 12940 of the
9 Government Code."

10 COMMISSIONER DOMBROWSKI: Second?

11 (No response)

12 COMMISSIONER DOMBROWSKI: Commissioner Broad?

13 COMMISSIONER BROAD: Subsection (C):

14 "For the purposes of this section,
15 'regularly scheduled' means a schedule where the
16 length of the shift and the days of work are
17 predesignated pursuant to a valid alternative
18 workweek agreement."

19 COMMISSIONER DOMBROWSKI: Were you -- I'm sorry.
20 Where are you?

21 COMMISSIONER BROAD: On Page -- on (C),
22 Paragraph (C) of the proposal that was noticed.

23 COMMISSIONER DOMBROWSKI: The one that begins,
24 "For the purposes of this section, 'regularly

1 scheduled' "?

2 COMMISSIONER BROAD: Yes.

3 COMMISSIONER DOMBROWSKI: Okay.

4 COMMISSIONER BROAD: And the difference is that
5 that means that they have to name -- they have to --
6 they're voting on the days of the week of their schedule
7 as opposed to number of days. And I would sort of add to
8 that that you would also change that in Paragraph (A).
9 Or actually, you could leave it as "scheduled workdays,"
10 actually the way it is, in your proposal.

11 COMMISSIONER DOMBROWSKI: All right. And this
12 is where I put in -- this is my proposal where I'm saying
13 "number of days."

14 COMMISSIONER BROAD: Right.

15 COMMISSIONER DOMBROWSKI: Got it.

16 Second?

17 COMMISSIONER BOSCO: Well, can I ask, how does
18 that differ from the way that you amended your proposal,
19 Mr. Chairman?

20 COMMISSIONER DOMBROWSKI: My proposal does not
21 make you designate the specific days of the workweek.
22 His proposal, if I understand it right, would have you
23 designate the specific days.

24 COMMISSIONER BROAD: In other words, you would

1 be voting on a four-10 arrangement Monday through Friday,
2 or a menu of alternatives that the employer would
3 propose, but that they would name the days of your
4 schedule.

5 COMMISSIONER DOMBROWSKI: This is the language
6 we said that was in the "Statement to the Basis" of the
7 interim wage order, my language is.

8 COMMISSIONER BOSCO: And this would be done on a
9 what, biweekly basis or something like that?

10 COMMISSIONER COLEMAN: It's annual. It's
11 annual, isn't it? The vote is annual.

12 COMMISSIONER BROAD: Well, I think they would
13 vote -- well, I don't know if it's annual. They vote
14 once for an alternative workweek arrangement, but --

15 COMMISSIONER BOSCO: I'm asking how often --

16 COMMISSIONER DOMBROWSKI: In practice, I think
17 you -- in practice, you would be doing regular schedules.
18 However -- you know, if that's every two weeks, every
19 month, depending on the business, that's the idea. What
20 I'm trying to get is that they have the flexibility to
21 juggle it around on a -- on a -- some regular basis.

22 COMMISSIONER BROAD: Right. The language that
23 we adopted a moment ago allowing the employee -- in
24 combination with what I'm just proposing and the language

1 we adopted a moment ago, a person would have a regularly
2 scheduled workweek, and by mutual consent with the
3 employer, they could switch the days of the week. That's
4 the -- that would be the effect of that.

5 My concern with the existing proposal and what
6 was in our interim wage order is that I do not see how
7 you can have a regularly scheduled workweek in which the
8 person at no time knows when they are scheduled to work,
9 which day of the week they are scheduled to work. It
10 might be an hour before they're scheduled to work. And I
11 don't think the Legislature contemplated that alternative
12 workweeks were intended to be on-call arrangements. And
13 that's my concern.

14 COMMISSIONER COLEMAN: But just to clarify, two
15 thirds of the work unit would have agreed to this
16 flexible work arrangement in the first place, right? So,
17 two thirds of them are agreeing to not have a five --
18 five 8-hour regular days, if they agree to this, whatever
19 the menu of options is.

20 COMMISSIONER BROAD: That's correct. And
21 obviously, they're going to tell them, "Your schedule is
22 such and such, your schedule is such and such." And
23 that's the point. I mean, I -- I don't --

24 COMMISSIONER BOSCO: Well, I think the real

1 operative word is "predesignated." And what you're
2 saying, I think, and I think Mr. Rankin talked to this,
3 is what does it mean to be "regularly scheduled." It
4 means to be predesignated to work a certain -- or to work
5 a certain number of -- certain days of the week and to be
6 off certain days of the week. But how often do these
7 schedules get made? Every couple weeks or something?

8 It seems to me that someone should know, within
9 that period of time, when they're --

10 COMMISSIONER DOMBROWSKI: I believe they will,
11 commissioner.

12 COMMISSIONER BROAD: Well --

13 COMMISSIONER BOSCO: You believe they will?
14 Well, perhaps --

15 COMMISSIONER DOMBROWSKI: Yes. They will have -
16 - they will be provided a schedule.

17 COMMISSIONER BOSCO: But certainly you couldn't
18 -- a year earlier -- I mean, certainly everybody's
19 schedule won't be set for a whole year.

20 COMMISSIONER DOMBROWSKI: With Commissioner
21 Broad's proposal, you would have to, I would assume,
22 schedule them regularly, Tuesday, Wednesday, Thursday, or
23 next week Wednesday, Thursday, Friday, in the election,
24 right?

1 COMMISSIONER BROAD: No, that's not my
2 intention, actually.

3 COMMISSIONER DOMBROWSKI: What are we -- what
4 are we doing here?

5 COMMISSIONER BROAD: My intention is -- I guess
6 I'm more along Commissioner Bosco's point of view. At
7 some point, regular people, when they go to work, know
8 which days of the week they're going to work.

9 COMMISSIONER DOMBROWSKI: Right.

10 COMMISSIONER BROAD: And it's a regular
11 schedule. And I don't believe that the Legislature
12 contemplated that it would be an on-call arrangement.

13 Now, at some point I believe you should be able
14 to -- the employer should be able to change the days of
15 the week, perhaps, but not --

16 COMMISSIONER DOMBROWSKI: Let me suggest that we
17 adopt the language that I'm proposing in the interim wage
18 order, that since then, it has been in the public domain.
19 Since then, I haven't seen one complaint from anyone
20 about this procedure, so what are we arguing about?
21 Where's the problem?

22 And until we see a problem -- I'm more than
23 willing to address it when we see a problem, but we've
24 had this out there and nobody is complaining about it.

1 COMMISSIONER BROAD: Well, sometimes it takes
2 more than two months for these complaints to work their
3 way forward.

4 COMMISSIONER COLEMAN: I think what we've heard
5 from testimony, though, the employer needs the certainty
6 as much as an employee does. I mean, they have to set a
7 certain number of people to schedule for the week. I
8 mean, it doesn't make any sense to the employer, just
9 like it doesn't make any sense to the employee, to have
10 it be an on-call arrangement. That wouldn't be a
11 rational way to run a business.

12 COMMISSIONER BROAD: Well, let me look -- at
13 some point -- I'm not sure we, any of us, disagree with
14 each other here. The question is, how do we introduce
15 the concept that you're letting the employee know in
16 advance what the days of the week that they'll work on,
17 more than twenty minutes before the day starts. It's --
18 that's -- there's no question here that I think -- do any
19 of you think that this allows someone to just say,
20 "You're working four days, and we'll tell you which days,
21 right before they happen"?

22 COMMISSIONER DOMBROWSKI: I don't think that's
23 happening.

24 COMMISSIONER BROAD: Well, I don't know whether

1 it's happening --

2 COMMISSIONER DOMBROWSKI: So why do we have to
3 change the language?

4 COMMISSIONER BROAD: Well, I don't know that
5 it's happening or not happening, except trying to make
6 people on-call employees is a big problem out there, as
7 far as I know.

8 COMMISSIONER DOMBROWSKI: You know,
9 commissioner, when it comes to be a problem, I'll be more
10 than willing to revisit the language.

11 Do we have a second?

12 COMMISSIONER BOSCO: I think this might be the
13 second thing that perhaps we could use some better
14 language on, because I really don't think there's any
15 disagreement on this. Maybe you could propose something,
16 you know, next time we meet.

17 I'm not going to second it right now, though.

18 COMMISSIONER BROAD: Okay.

19 COMMISSIONER DOMBROWSKI: Commissioner Broad?

20 COMMISSIONER BROAD: I'm going.

21 Okay. On Page -- on the election procedures, I
22 would like to make a substitute motion to the proposal in
23 the -- in the noticed provision, and with the following
24 changes to it: in Paragraph (G), strike the sentence,

1 "The employer shall select a neutral party to conduct the
2 election from a list maintained by the Labor Commissioner
3 of approved neutral third-party organizations," and
4 substitute:

5 "Upon a complaint by an affected employee and
6 after an investigation by the Labor
7 Commissioner, the Labor Commissioner may require
8 the employer to select a neutral third party to
9 conduct the election."

10 On Paragraph (I), add: "The Labor
11 Commissioner's determination shall be final and binding."

12 On Paragraph (J), strike "Violation of this
13 subsection shall" and add:

14 "The Labor Commissioner shall investigate
15 any alleged violation of this section and may
16 render the alternative workweek schedule null
17 and void."

18 Let me suggest what the changes are. Paragraph
19 (A) for the election procedure says:

20 "An employer may submit a proposal to hold
21 an election seeking the adoption of an
22 alternative workweek schedule no less than
23 twelve months after a prior election to
24 establish or repeal an alternative workweek

1 schedule."

2 That is the existing rule as it is always applied. Mr.
3 Dombrowski's proposal would, I believe, allow elections
4 to happen as frequently as anyone wanted to call them.

5 COMMISSIONER DOMBROWSKI: No, I don't believe
6 so.

7 COMMISSIONER BROAD: I think so.

8 COMMISSIONER DOMBROWSKI: Where are we?

9 (Pause)

10 COMMISSIONER DOMBROWSKI: Which page is that?
11 Yeah.

12 COMMISSIONER BROAD: Oh, I see, what your --
13 it's in your Paragraph (D).

14 COMMISSIONER DOMBROWSKI: You've got it. It's
15 in my -- it's in Paragraph (D).

16 COMMISSIONER BROAD: Okay.

17 Paragraph (C) adds the language "sharing a
18 community of interest."

19 We had the discussion about Paragraph (D), from
20 Mr. Rankin.

21 COMMISSIONER BOSCO: Well, are you going to go -
22 - why don't we do a little bit of this at a time?

23 COMMISSIONER DOMBROWSKI: Where are you again?

24 COMMISSIONER BROAD: You want -- okay, you want

1 to just try to do each one?

2 COMMISSIONER BOSCO: Yeah.

3 COMMISSIONER BROAD: Okay. All right.

4 COMMISSIONER BOSCO: We've been doing pretty
5 well on that so far. Let's --

6 COMMISSIONER BROAD: Yeah. It kind of depends
7 how you look at it.

8 COMMISSIONER BOSCO: I'm not saying the results
9 have been, but at least that procedure.

10 COMMISSIONER BROAD: Okay. Paragraph (C) would
11 provide that except for the alternative workweeks with
12 regard to healthcare employees that are doing 12-hour
13 shifts,

14 " -- for the purposes of this section, a 'work
15 unit' may include all nonexempt employees in a
16 division, department, job classification, or
17 shift sharing a community of interest concerning
18 the conditions of their employment in a readily
19 identifiable work group."

20 "Or shift sharing a community of interest concerning the
21 conditions of their employment in a readily identifiable
22 work group" is what is added.

23 The existing rule has no concept in it that the
24 employees have to be somehow related in some way to one

1 another. And I think employers should -- it's very wide-
2 ranging language as it is, but at least suggests that the
3 employer -- and it can be down to one individual --
4 however, the employees need to be somehow related to one
5 another. It does not make sense for an employer to have
6 an alternative workweek schedule that has, you know, the
7 janitors in one facility and the television engineers in
8 another facility of the same employer voting together.

9 COMMISSIONER BOSCO: Okay. I'll second that.

10 COMMISSIONER DOMBROWSKI: Can I just make a
11 comment that my language is, again, taken out of our --
12 it's taken out of the existing wage order.

13 We have a second. Call the roll.

14 MR. BARON: Dombrowski.

15 COMMISSIONER DOMBROWSKI: No.

16 MR. BARON: Bosco.

17 COMMISSIONER BOSCO: Aye.

18 MR. BARON: Broad.

19 COMMISSIONER BROAD: Aye.

20 MR. BARON: Coleman.

21 COMMISSIONER COLEMAN: No.

22 MR. BARON: Two to two.

23 COMMISSIONER BROAD: Paragraph (D) of -- says
24 that,

1 "At least 14 days prior to an election on a
2 proposal to adopt or repeal an alternative
3 workweek schedule, the employer shall provide
4 each affected employee with a written disclosure
5 of the time and location of the balloting, the
6 effects of the adoption of the proposal on the
7 wages, hours, and benefits of the employee, the
8 rights of employees to repeal the proposal" --
9 -- and the new -- and then I will strike "the neutral
10 party selected to conduct the election pursuant to (D),
11 and the right of employees to request of the Labor
12 Commissioner of the appropriateness of a designated work
13 unit."

14 "This written disclosure shall be distributed at
15 a meeting held during the regular work hours and
16 at the work site of the affected employees. An
17 employer shall provide that disclosure in a non-
18 English language as well as English if at least
19 5 percent of the affected employees primarily
20 speak that non-English language. The employer
21 shall mail the written disclosure to employees
22 who do not attend the meeting. The failure by
23 an employer to distribute this written
24 disclosure at the meeting and by mail renders

1 the adoption of an employer-proposed alternative
2 workweek schedule null and void."

3 The difference here is -- actually, it just sort
4 of fleshes out what the requirement is. Right now there
5 is nothing that -- the employer has to hold a meeting, as
6 I understand it, under Mr. Dombrowski's proposal, but
7 doesn't -- it's not clear what happens to people who
8 can't -- who are not there that day at work, or who are
9 sick. This requires them to just mail the written notice
10 that's already required to them and to provide -- where
11 you have non-English-speaking employees, to provide it in
12 that language so that they can understand what they're
13 voting on.

14 I think that would be the only significant
15 changes from the current requirement.

16 COMMISSIONER DOMBROWSKI: Again, in the current
17 wage order, it's:

18 "Such a disclosure shall include meetings duly
19 noticed, held at least 14 days prior to voting,
20 for the specific purpose of discussing effects
21 of the flexible work arrangement. Failure to
22 comply with this section shall make the election
23 null and void."

24 COMMISSIONER BROAD: Right. So, I think what is

1 -- what is being added here is a requirement that --
2 spelling out what's in the proposal, and that the written
3 disclosure be given to employees who are not present for
4 the meetings, and that it be distributed in non-English
5 languages where they -- people don't speak English. We,
6 of course, have a large percentage of the workforce that
7 -- whose first language, and in some circumstances, only
8 language, is a non-English language.

9 COMMISSIONER COLEMAN: Just a point of
10 clarification. Do you know if this was part of the
11 previous arrangements for alternative work voting, or is
12 this --

13 COMMISSIONER BROAD: That would be a --

14 COMMISSIONER COLEMAN: Or is this fairly new --

15 COMMISSIONER BROAD: This is new.

16 COMMISSIONER COLEMAN: -- way of doing it?
17 Okay.

18 COMMISSIONER BOSCO: Can I again -- as I
19 understand it, you're adding the requirement of mailing
20 to people that aren't present or can't be present, and
21 that it -- the notice be in the language that that
22 individual speaks, if it's non-English.

23 COMMISSIONER BROAD: Well, if it's 5 percent or
24 more of the workforce.

1 COMMISSIONER BOSCO: And that's the only change
2 that you're contemplating?

3 COMMISSIONER BROAD: I believe so. I think, in
4 the first sentence, where it says, "The employer shall
5 provide each affected employee with a written disclosure
6 of the time and location of the balloting, the effects of
7 the adoption of the proposal on the wages, hours, and
8 benefits," I believe that is what's required now, the
9 effects on the wages, hours, and benefits. It doesn't --
10 it's assumed, but doesn't say, require, that the time and
11 place of the balloting be noted. The right of employees
12 to repeal the proposal is in the wage order, but would be
13 -- would be part of this notification, and the right of
14 employees to request review by the Labor Commissioner of
15 the appropriateness of a designated work unit.

16 COMMISSIONER DOMBROWSKI: I'm going to make --
17 again, Barry, when you're doing an alternative workweek,
18 the employer is trying to encourage the vote. And I --
19 again, I haven't heard problems on this. I haven't heard
20 of anybody saying they were excluded from the vote, they
21 didn't get the materials. I mean, I just, from a
22 philosophical point of view, it seems like we have enough
23 direction there for the procedures and that they would be
24 followed, to encourage, to get the vote --

1 COMMISSIONER BROAD: Well, Mr. Chairman,
2 actually, the fact of the matter is that there was never
3 any legal requirement that any of these elections be
4 filed with the Labor Commissioner. The employers, prior
5 to AB 60, vigorously opposed that because they didn't
6 want to tell the government that the elections were ever
7 happening. So we never knew how many alternative
8 workweeks were ever out there, since 1976. So, we don't
9 know how many violations there were, or what the
10 employers were doing, or whether they were saying, "Hey,
11 here's what we're voting on; vote for it." We really
12 don't know.

13 However, I think that the employer -- there is
14 nothing that the employer should fear from having to tell
15 employees the truth about what the law provides. The
16 employer can make all kinds of arguments about why this
17 is a good idea, why it's the greatest thing in the world,
18 but employees should have the right to know what is
19 occurring. It's a requirement that is posted, in any
20 case, or is supposed to be posted, with the wage order
21 anyway. So I just don't see what the problem is.

22 COMMISSIONER COLEMAN: The bill requires that --
23 the current bill requires that they report the results of
24 the elections to the Labor Commissioner anyway, doesn't

1 it?

2 COMMISSIONER BROAD: That's correct.

3 COMMISSIONER COLEMAN: Okay.

4 COMMISSIONER DOMBROWSKI: Does everybody
5 understand the proposal?

6 Could I have a second?

7 (No response)

8 COMMISSIONER DOMBROWSKI: Commissioner Broad?

9 COMMISSIONER BROAD: Paragraph (F):

10 "Only employees who have been hired on a
11 permanent full-time or permanent part-time basis
12 who have worked at least 8 hours per week in the
13 thirteen weeks preceding the election shall be
14 eligible to vote."

15 I think the problem here is what happens when,
16 particularly in seasonal industries, you know, what
17 occurs when a whole bunch of people leave or go within a
18 period, and that the timing is made -- could vary
19 considerably the number of people who are eligible to
20 vote, since the election binds all future employees and
21 you may have a situation where the workforce composition
22 changes dramatically.

23 COMMISSIONER DOMBROWSKI: You know, as I read
24 this, though, afterwards, I think it conflicts, because

1 we are proposing that all affected employees be able to
2 vote, and then we're proposing that only those -- well,
3 not all affected employees. And I, again, would rather
4 leave it with all affected employees being able to vote,
5 and let's -- again, if problems develop, let's address
6 that at that point.

7 COMMISSIONER BOSCO: I didn't hear any testimony
8 that there is this sort of expansion and contraction of
9 the voting pool, you know, that regularly happens. So, I
10 mean, it doesn't seem to me that, at least from the
11 testimony, that we need to fix something that no one's
12 complained is broken.

13 COMMISSIONER BROAD: All right.

14 Paragraph (G):

15 "Any election to establish or repeal an
16 alternative workweek schedule shall be held
17 during the regular working hours at the work
18 site of the affected employees."

19 I believe that's in the chairman's proposal.

20 "The employer shall bear the costs of conducting
21 an election held pursuant to this section" is current
22 law, but is not in the wage orders, and I think should be
23 specified. They can't charge the employees for the costs
24 of conducting an election.

1 "Upon complaint by an affected employee and
2 after investigation by the Labor Commissioner,
3 the Labor Commissioner may require the employer
4 to select a neutral third party to conduct the
5 election."

6 COMMISSIONER DOMBROWSKI: And I will second that
7 motion, Barry.

8 Andy, we need to have a roll.

9 COMMISSIONER BROAD: Things are getting better.
10 (Laughter)

11 COMMISSIONER BROAD: Gradually.

12 COMMISSIONER BOSCO: Make slight gains on this.

13 MR. BARON: Dombrowski.

14 COMMISSIONER DOMBROWSKI: Aye.

15 MR. BARON: Bosco.

16 COMMISSIONER BOSCO: Aye.

17 MR. BARON: Broad.

18 COMMISSIONER BROAD: Aye.

19 MR. BARON: Coleman.

20 COMMISSIONER COLEMAN: Aye.

21 MR. BARON: Four-zip.

22 COMMISSIONER BROAD: Paragraph (H):

23 "Employees affected by the change in any
24 work hours resulting from the adoption of an

1 alternative workweek schedule may not be
2 required to work those new hours for at least 30
3 days after the announcement of the final results
4 of the election."

5 The purpose of this is to ensure that people can
6 rearrange their lives to do this. We heard a great deal
7 of testimony about family matters and childcare and other
8 concerns that are raised. Going from an 8-hour shift to
9 -- you know, five 8-hour days to three 12-hour days,
10 would necessarily require major changes in things like
11 childcare and transportation. So I think this is a very
12 reasonable proposal.

13 COMMISSIONER BOSCO: I'll second it.

14 COMMISSIONER COLEMAN: My concern on this is
15 that I'm afraid we limit the flexibility of the workers
16 and the workplace, putting 30 days in.

17 COMMISSIONER DOMBROWSKI: Could we just --

18 COMMISSIONER COLEMAN: If we've two thirds of
19 the majority voting for the thing, I think we should
20 leave the flexibility to the --

21 COMMISSIONER BOSCO: Well, this doesn't prohibit
22 it from going into effect. You just can't require those
23 that don't want to do it to do it for 30 days, right? I
24 mean, say if one person doesn't want to do it, they

1 simply would have to be set aside, I guess. I mean, I
2 think you could implement the plan right away, and then
3 those that simply need 30 days to get acclimated to it
4 would have that. That's how I read it.

5 COMMISSIONER COLEMAN: So this wouldn't preclude
6 them from implementing it before 30 days, if the majority
7 --

8 COMMISSIONER BOSCO: Not as I read it. It just
9 says, "No employee shall be required to," right?

10 COMMISSIONER BROAD: Yeah. You know, it --
11 well, I don't --

12 COMMISSIONER DOMBROWSKI: Could I -- I actually
13 thought I had something on this in my language.

14 COMMISSIONER BROAD: You have something that
15 says when the election is held, not when the proposal
16 goes into effect for the employees. So I just don't
17 think you've addressed it in your proposal.

18 COMMISSIONER BOSCO: I think, when you have
19 something as important as going from an 8-hour day to a
20 12-hour day or something in between, people should have a
21 period of time to adjust to that. This doesn't preclude
22 -- as I say, it doesn't preclude 80 percent of the people
23 from going -- making the change immediately.

24 COMMISSIONER BROAD: I mean, for example,

1 anybody who has kids in childcare knows that you're
2 paying by the month.

3 COMMISSIONER DOMBROWSKI: Okay.

4 COMMISSIONER BROAD: So you've got to get to the
5 end of the month.

6 COMMISSIONER DOMBROWSKI: Barry, you've got my
7 vote.

8 Call the roll.

9 COMMISSIONER BOSCO: See, Barry, when we team up
10 on these things --

11 COMMISSIONER BROAD: Yeah.

12 MR. BARON: Dombrowski.

13 COMMISSIONER DOMBROWSKI: Aye.

14 MR. BARON: Bosco.

15 COMMISSIONER BOSCO: Aye.

16 MR. BARON: Broad.

17 COMMISSIONER BROAD: Aye.

18 MR. BARON: Coleman.

19 COMMISSIONER COLEMAN: Aye.

20 MR. BARON: Four-zip.

21 BB. Okay. Paragraph (I), it's already in the
22 proposal, and it is in the statute, I believe, as well as
23 in the proposal -- correct me if I'm wrong -- I know it's
24 in the statute -- I'm not sure if it's in Mr.

1 Dombrowski's proposal -- but:

2 "No work unit may be established by an
3 employer solely for the purposes of adopting or
4 repealing an alternative workweek schedule. The
5 Labor Commissioner" --

6 -- and this is new --

7 " -- shall review and approve, reject, or modify
8 the designation of any work unit of affected
9 employees by an employer if a written request is
10 made to the commissioner by an employee of the
11 employer at least seven days prior to the date
12 of the election held on the proposed adoption of
13 an alternative workweek schedule. The Labor
14 Commissioner's determination shall be final and
15 binding."

16 This allows employees who feel like this is a bizarre or
17 inappropriate work unit, where people do not belong
18 together in any logical way, to make a request to the
19 Labor Commissioner. The Labor Commissioner -- the Labor
20 Commissioner's determination would settle the matter for
21 all purposes for that election.

22 COMMISSIONER DOMBROWSKI: Second?

23 (No response)

24 COMMISSIONER DOMBROWSKI: Commissioner Broad?

1 COMMISSIONER BROAD: Okay. Paragraph (J):
2 "The employer shall maintain an atmosphere
3 of neutrality regarding the election and
4 employees shall be free from intimidation and
5 coercion. No employee shall be discharged or
6 discriminated against for expressing opinions
7 concerning the alternative workweek election or
8 for opposing or supporting its adoption or
9 repeal. The Labor Commissioner shall
10 investigate any alleged violation of this
11 section and may render the alternative workweek
12 schedule null and void."

13 The purpose here is to require that the employer not be
14 engaging in conduct which is intimidating or coercive.
15 The idea of having a secret ballot vote is that employees
16 are free to vote and should be free to talk about this
17 matter at work and express their opinions without fear of
18 retribution.

19 I can't -- I don't know that any of the
20 employers commented in any way that this was problematic,
21 in any of their correspondence. And it seems like it's
22 axiomatic that the atmosphere in which this election is
23 conducted should be neutral.

24 COMMISSIONER BOSCO: I have a question. I

1 think, obviously, you'd want to maintain an atmosphere of
2 neutrality, but that would not prohibit the employer from
3 taking a position on the subject. Is that true? I mean,
4 wouldn't it --

5 COMMISSIONER BROAD: Right. And to answer -- I
6 think, to answer that, I think maybe we should add a
7 sentence that said, "Nothing in this section shall
8 prohibit an employer from expressing its opinion with
9 regard to the proposed alternative workweek."

10 COMMISSIONER BOSCO: With that change, I'll
11 second the amendment.

12 COMMISSIONER DOMBROWSKI: Was this -- I have a
13 question. Was this in AB 60 at any point?

14 COMMISSIONER BROAD: No.

15 MR. BARON: And where --

16 COMMISSIONER BROAD: Oh, gosh -- after the
17 second sentence, "Nothing in this section shall prohibit
18 an employer from expressing its opinion with regard to
19 the proposed alternative workweek arrangement."

20 COMMISSIONER COLEMAN: Is that problematic with
21 the sentence that says the employer must maintain an
22 atmosphere of neutrality?
23 Do you --

24 COMMISSIONER BOSCO: Well, that's why I raised

1 it. But I think an atmosphere of neutrality is one where
2 people aren't, you know, being coerced or intimidated.
3 That's different from an employer being able to say, "In
4 my opinion, this is a bad idea or a good idea."

5 COMMISSIONER BROAD: I think it's the difference
6 between an employer saying, "Hey, you know, I think this
7 would be really good for us to do this shift," and an
8 employer saying, "Why are the two of you standing there
9 talking? You know, what are you talking about?" You
10 know, that's -- well, I don't really want to -- "Why are"
11 -- you know, "Are you talking about this alternative
12 workweek thing?," you know. "Stop talking about it."
13 That would be, I think, a violation of this section.

14 Obviously, the employer is proposing it and is
15 in favor of it, and the employer has every right to say
16 that they think it's a good idea.

17 COMMISSIONER BOSCO: Kind of eliminate the water
18 coolers and everything before --

19 COMMISSIONER BROAD: Yeah, right.

20 COMMISSIONER DOMBROWSKI: Okay. So we have a
21 second?

22 COMMISSIONER BOSCO: Yes.

23 COMMISSIONER DOMBROWSKI: Call the roll.

24 MR. BARON: Dombrowski.

1 COMMISSIONER DOMBROWSKI: No.

2 MR. BARON: Bosco.

3 COMMISSIONER BOSCO: Aye.

4 MR. BARON: Broad.

5 COMMISSIONER BROAD: Aye.

6 MR. BARON: Coleman.

7 COMMISSIONER COLEMAN: No.

8 MR. BARON: Two-two.

9 COMMISSIONER BROAD: Okay. With that, I would

10 make -- well, I want to understand something, Mr.

11 Chairman. With respect to the issues where Mr. Bosco and

12 myself voted "aye" and where there might be a reasonable

13 likelihood that Mr. Rose would vote "aye," I assume that

14 we will be free at the next meeting to put those issues

15 on the agenda for reconsideration. Is that how --

16 COMMISSIONER DOMBROWSKI: Reconsideration, but

17 no testimony, if that's okay with you.

18 COMMISSIONER BROAD: That's fine with me.

19 COMMISSIONER DOMBROWSKI: Yeah. And, I mean,

20 that's fine, and everyone should understand that.

21 MR. BARON: So can I just --

22 COMMISSIONER BROAD: I have nothing more.

23 MR. BARON: Can I just -- can I just be clear on

24 the last? So on all the items were there were like two-

1 to-two votes, those items will be noted for
2 reconsideration? Is that the point?

3 COMMISSIONER BROAD: Is that right or --

4 COMMISSIONER COLEMAN: The two-to-two votes.

5 COMMISSIONER BROAD: As well as the matters that
6 were -- well, actually, I think --

7 COMMISSIONER BOSCO: Technically,
8 reconsideration is usually done by someone that wants to
9 vote the other way on something. But I think it just be
10 an agreement between us that, on those items -- that
11 we're not going to open up the whole thing, but on those
12 items, we'll reopen them. Can't we agree to that?

13 COMMISSIONER DOMBROWSKI: I'm fine with that.

14 COMMISSIONER BROAD: Okay.

15 COMMISSIONER BOSCO: I don't think it's a
16 technical reconsideration.

17 COMMISSIONER BROAD: Right, right. Okay. Then
18 we'll just assume that that will -- that those items will
19 be on the agenda.

20 COMMISSIONER DOMBROWSKI: Okay.

21 COMMISSIONER BOSCO: Could we have like a two-
22 or three-minute break? Are we finished with what we're
23 going to do here? Could we have a couple minutes right
24 now?

1 COMMISSIONER DOMBROWSKI: Sure.

2 (Thereupon, a short recess was taken.)

3 COMMISSIONER DOMBROWSKI: We'll reconvene the
4 hearing. I believe we last left that we had agreed to
5 notice for reconsideration all of the items that were
6 two-to-two votes. There are a couple other items that I
7 agree that we will schedule for reconsideration as well.

8 Commissioner Broad, do you want to --

9 COMMISSIONER BROAD: Yes. Those items are the
10 definition of who is covered in healthcare by 12-hour
11 days, and the issue of whether overtime for those 12-hour
12 days is to be paid after 40 hours or after 36 hours.

13 COMMISSIONER DOMBROWSKI: Okay.

14 Commissioner Bosco, is there anything else?

15 COMMISSIONER BOSCO: Mr. Chairman, I'd like to
16 return to, actually, where I started on this. And I -- I
17 feel that we should pay closer attention to who's covered
18 under the definition of "healthcare industry." And I'd
19 like to have that discussed again when we meet.

20 COMMISSIONER DOMBROWSKI: Agreed.

21 COMMISSIONER BOSCO: Also, could I ask a
22 technical question of our legal counsel or other staff
23 people, or anyone who might know the answer to this?

24 I'm not familiar with the noticing requirements

1 in California as to -- the way we've been doing this now
2 is we noticed one proposal, and we're amending back and
3 forth and rewriting --

4 COMMISSIONER DOMBROWSKI: Right.

5 COMMISSIONER BOSCO: -- and I don't know if we
6 have to put out for public notice what we've done now,
7 before we vote on it, or --

8 COMMISSIONER DOMBROWSKI: We've followed the
9 procedures on this that I believe we followed, basically,
10 on in the interim wage order, in terms of posting
11 something out and then amending it at the hearing. I
12 sympathize that it's very messy and ugly, but --

13 COMMISSIONER BROAD: Well, the only distinction,
14 I would say, is that what we did today was not amend what
15 was noticed, but amend something that wasn't noticed,
16 that is to say, your proposal. And that's the difference
17 between -- and perhaps critical difference -- between
18 what was done at the interim -- with the interim wage
19 order. We made a modification of the thing that was
20 noticed to the public.

21 COMMISSIONER DOMBROWSKI: But when all is said
22 and done, this is an amendment to your notice. What I
23 prepared was from existing orders, interim wage orders,
24 interim statute, and then the amendments that were

1 suggested.

2 So, again, I think -- I would not that we are
3 scheduling for reconsideration those controversial items.

4 Anything you want to add?

5 (No response)

6 COMMISSIONER DOMBROWSKI: Okay. Andy, I think
7 you have to make -- you have some language to the chair's
8 alternative proposal which we are substituting as an
9 amendment to Commissioner Broad's proposal. Do we have a
10 motion?

11 COMMISSIONER BOSCO: Yes, I move adoption of the
12 chair's amended proposal.

13 COMMISSIONER DOMBROWSKI: Second?

14 COMMISSIONER COLEMAN: Second.

15 COMMISSIONER BROAD: Point of order.

16 COMMISSIONER DOMBROWSKI: Um-hmm.

17 COMMISSIONER BROAD: That proposal, as amended
18 by the various things that we --

19 COMMISSIONER DOMBROWSKI: Right.

20 COMMISSIONER BROAD: Okay, that -- that I had
21 suggested that received three votes.

22 COMMISSIONER DOMBROWSKI: Correct.

23 COMMISSIONER BROAD: Okay.

24 COMMISSIONER DOMBROWSKI: Call the roll.

1 MR. BARON: Dombrowski.

2 COMMISSIONER DOMBROWSKI: Aye.

3 MR. BARON: Bosco.

4 COMMISSIONER BOSCO: Aye.

5 MR. BARON: Broad.

6 COMMISSIONER BROAD: No.

7 MR. BARON: Coleman.

8 COMMISSIONER COLEMAN: Aye.

9 MR. BARON: Three-one, adopted.

10 COMMISSIONER DOMBROWSKI: Okay. The next item
11 on the agenda is consideration of amendment to Wage Order
12 5 deleting personal attendants, resident managers, and
13 employees who have direct responsibility for children in
14 24-hour care from Section 3(D) of that order to comply
15 with pertinent federal regulations.

16 Mr. Baron.

17 MR. BARON: The issue, which has been raised
18 previously, is that in the -- in Order 5, as amended in
19 '93, this Section 3(D) called for, again, personal
20 attendants, resident managers, and this issue of adult
21 employees, were under a situation where they had
22 exemption for up to 54 hours. In 1998, at the same time
23 when the 8-hour day was repealed, representatives of the
24 Department of Labor informed the Commission that these

1 exemptions violate the Fair Labor Standards Act, and
2 that, as opposed to 54 hours, that it needed to be 40.
3 So, in the 1998 version of the orders, the Commission
4 adjusted it from 54 back to 40.

5 However, as part of AB 60, AB 60 makes reference
6 of going back now to the earlier version of the orders,
7 so we now go back to the '93 version that has 54 hours.
8 So, the representatives of the Department of Labor came
9 and said that, you know, we're now back to where we were
10 before, and that this 54 hours is out of compliance with
11 the Fair Labor Standards Act.

12 So, you have language sitting before you that,
13 in essence, deletes from the 54-hour exemption those same
14 -- those same entities that you see crossed out, to then
15 conform with the feds, and so that, therefore, the only
16 one that's left in here is organized camp counselors,
17 which is
18 -- who do have that degree of exemption. So it basically
19 -- basically, what this would do is put these folks in
20 the same situation as employees generally, in that, you
21 know, they then would, you know, have to live under --
22 let alone FLSA, but also have to live under AB 60.

23 And my understanding is that I've been
24 approached by representatives of entities involved here

1 saying that what -- that they seem to understand that
2 they go back to 40, but that they're still looking to not
3 have to be covered under the 8-hour day. I had said
4 that, among other things, that the only instances where
5 the Commission has looked to deal with ongoing
6 exemptions, exemptions looking at this, had been for the
7 industries and occupations that have been specifically
8 delineated in the bill, and that otherwise, the
9 Commission, like -- be it for computer professionals or
10 the construction industry, has always kind of -- the
11 policy has been that you would have to go to wage boards.

12 So, that's basically where the issue is sitting
13 here. There seems to be some interest on behalf of these
14 entities of wanting to have some time to inform their
15 folks of what the situation is going to be. So, you
16 know, if people want to, you know, put off till the next
17 hearing doing this -- but the fact is that -- again, I've
18 laid out what the situation is in terms of state and
19 federal law.

20 COMMISSIONER DOMBROWSKI: So, let me understand.
21 The parties affect us want us to put this over for the
22 next hearing so that they can communicate with us?

23 MR. BARON: So that, I guess, in general, they
24 can communicate with their folks the change in

1 circumstance, and that -- my understanding is, is that
2 they may be coming back before the Commission to deal
3 with this issue, but, you know, my understanding here is
4 that for the Commission to deal with this issue in line
5 with the approach they've taken to any industry or
6 occupation that was not specifically listed in the bill,
7 is that you would have to go to a wage board. So, I
8 mean, if --

9 COMMISSIONER DOMBROWSKI: All right. Without
10 objection, I would -- I would move that we just put this
11 over, then, to the next hearing and give them some time.

12 COMMISSIONER COLEMAN: Second.

13 COMMISSIONER DOMBROWSKI: We're talking about
14 putting this item over to the next hearing.

15 Call the roll.

16 All in favor?

17 (Chorus of "ayes")

18 COMMISSIONER DOMBROWSKI: Item 4, in accordance
19 with provisions of Labor Code Section 554 and 558,
20 consideration of and public comment on and an amendment
21 to Wage Order 14 to add the language in Section 10 of
22 Interim Wage Order 2000, "Civil Penalties," to Section 17
23 of Wage Order 14.

24 MR. BARON: This deals with the fact that in AB

1 60, there's reference in Section 554 that basically says
2 that AB 60 does not apply to Order 14, which affects
3 agricultural employees, other than Section 558. Section
4 558 is the section that lays out penalties. So,
5 basically, all we are doing here is taking the mandate of
6 AB 60 and putting those penalties, which are both listed
7 in the bill and listed in Section 10 of the interim, and
8 just saying that we will be putting those penalties into
9 Order 14.

10 COMMISSIONER DOMBROWSKI: Okay. What do you
11 need us to do?

12 Okay. Can I get a motion to adopt?

13 COMMISSIONER BOSCO: So moved.

14 COMMISSIONER DOMBROWSKI: A second?

15 COMMISSIONER COLEMAN: Second.

16 COMMISSIONER DOMBROWSKI: All in favor, say
17 "aye."

18 (Chorus of "ayes")

19 MR. BARON: So adopted.

20 COMMISSIONER DOMBROWSKI: Item Number 5 is
21 further consideration of managerial duties.

22 COMMISSIONER BOSCO: Don't you think we've had
23 enough controversy for one day?

24 COMMISSIONER DOMBROWSKI: Well, I do, and I

1 would state up front, I've been informed we're not going
2 to take a vote on this issue, so what I would like to do
3 is just simply have a twenty-minute discussion, ten
4 minutes of the proponents, and then I'd like to get ten
5 minutes in response, with the understanding that we'll be
6 recalendaring this again for the next hearing.

7 Mr. Young and Ms. Thompson.

8 Is this item in the packet somewhere?

9 MR. YOUNG: Thank you, Mr. Chairman and members.
10 I understood our item wasn't a prime-time event. I just
11 didn't expect to follow Conan O'Brien on the time slot
12 here.

13 Again, as you stated, we want to -- actually
14 wanted to use this time to come to the Commission, not
15 ask for a vote, because this has really become like
16 untying a Gordian knot. I mean, it is -- it's one of
17 those damn Rubik's Cubes; we have not figured out how to
18 get all the colors aligned yet.

19 What you have in front of us is -- in front of
20 you is a work in progress, and truly nothing more than
21 that. I mean, the proponents and the opponents, I mean,
22 we literally finished this just yesterday and shared it
23 with them. We want them to have a chance to digest and
24 come back to us with suggestions and try to get further

1 input. It's furthermore our desire to make sure this
2 does not affect the construction trades, to limit it to
3 Wage Orders 4, 5, and 7.

4 And the one thing we do feel strongly about this
5 is, in keeping with the language that was in AB 60
6 certainly -- and our desire is to get -- and one of the
7 things we took to heart, the criticism of our previous
8 proposal, is that it was in conflict with FLSA
9 regulations. We're trying to get closer to that, and, in
10 essence, we're trying to, in short form -- or, excuse me
11 -- in short, trying to adopt the federal long form, the
12 long test for what is a manager. Again, we're not there
13 yet. We continue -- we will continue to work on this and
14 report to the Commission and all interested parties
15 before we ask the Commission to study our final work
16 product.

17 I have Lynn Thompson, who can at least explain
18 at least where we're at now, and I'll turn it over to
19 her.

20 MS. THOMPSON: My name is Lynn Thompson, and I'm
21 an attorney with the Law Firm of Brian Kays, LLP, in Los
22 Angeles. And I have been working with the California
23 Retailers Association and my clients, who are businesses
24 in California, to try to come to grips with the

1 definition of duties that meet the test of the exemption
2 for purposes of the executive, the administrative, and
3 the professional exemptions in California.

4 I think that employers doing business in
5 California have a real need for clarification of the
6 duties test. They need to have rules that they can
7 clearly understand and follow. The existing language in
8 the wage orders has been very sparse, and it has been the
9 subject of interpretation by the DLSE over the years,
10 and, quite frankly, in the employer community, we have
11 experienced variations in the interpretation of the
12 exemptions over the years and the tests that are being
13 applied and the duties that are considered exempt and
14 nonexempt. And we think that there's a real need for
15 clarity.

16 What this proposal is not about is not about
17 creating a loophole to somehow render large groups of
18 employees exempt simply because they have a managerial
19 title and managerial responsibilities. That's not what
20 we're trying to achieve. We understand very clearly that
21 the statute requires that more than 50 percent of the
22 employee's time must be spent engaged in exempt duties,
23 and we understand that our task here is to try to
24 identify what are those duties that constitute exempt

1 duties for purposes of satisfying that requirement.

2 The proposal that was present a couple of months
3 ago and hotly debated was the subject of some objections,
4 which included a concern that the attempt to enumerate
5 duties for executives was somehow too broad. Some
6 believed that it went beyond even the duties that would
7 be considered exempt under the FLSA. There was concern
8 that it didn't include certain elements of the duties
9 test that had been historically adopted by the DLSE in
10 California that we derived from the federal long test
11 duties.

12 And so the proposal you have in front of you is
13 an effort to try to build back in some of those concepts,
14 and hopefully do it in a way that will make everybody
15 comfortable that it's in the best interests of both
16 business and employees in the State of California.

17 If you just take a look at the proposal, my task
18 here today is to try to outline it for you, really, and
19 try to express what the objectives are for the proposal.
20 I personally think we've gotten pretty close to a
21 workable draft, but there are still some questions that
22 have been raised, and we're going to be working through
23 those in the next month.

24 But fundamentally, I think what you have to

1 understand as a baseline is that, under federal law, for
2 employees that are earning two times the minimum wage in
3 California, the federal short test applies, the short
4 test for determining the exemptions. And that is purely
5 a qualitative test that requires that primary duty be
6 management, and that the employee direct two or more
7 employees. That is the federal baseline.

8 Now, what we are proposing to do here --

9 COMMISSIONER BROAD: Excuse me. That is not
10 California law, however.

11 MS. THOMPSON: That is the federal baseline.

12 COMMISSIONER BROAD: Right. So it's not
13 relevant to this discussion because we do not have a
14 "primary duty" test, period.

15 MS. THOMPSON: I'm just saying to you that that
16 is the federal -- that is the federal standard that
17 applies to employees in California. That's -- that is --
18 we're working -- we have to operate here under both
19 federal and state law. I'm just trying to create a
20 framework. I'm not
21 suggesting --

22 COMMISSIONER BROAD: But that --

23 MS. THOMPSON: -- that that's the state test.

24 COMMISSIONER BROAD: But the state -- but the

1 federal test does not apply under the Fair Labor
2 Standards Act because the state provides a more
3 protective standard.

4 MS. THOMPSON: Actually, the federal law does
5 apply under the Fair Labor Standards Act if people go to
6 the federal law to enforce the overtime laws. The
7 federal law applies equally in California. The
8 Department of Labor has jurisdiction to enforce the Fair
9 Labor Standards Act in California, and, in fact, does so.
10 As a practical matter, many overtime claims tend to be
11 spiraled up through the state system in California
12 because the requirements have traditionally been more
13 restrictive.

14 But from an employer -- from a business
15 standard, we have to worry about complying with both sets
16 of regulations in California. We're not exempt from the
17 Fair Labor Standards Act here. So all I'm trying to say
18 is that we have a baseline here.

19 As an employer, when you look at your wage and
20 hour obligations, you look at federal law and you see
21 we're paying people two times the minimum wage, we have
22 to satisfy these requirements under the Fair Labor
23 Standards Act. It doesn't matter what California says;
24 we have to do that in order to be in compliance with

1 federal law.

2 Okay. Now we turn to California law. And what
3 do we need to do to satisfy the requirements for an
4 exemption, for an analogous exemption, under California
5 law? That's -- that's the premise.

6 Now --

7 COMMISSIONER BROAD: Though if you satisfy the
8 federal law but do not satisfy the California law, you've
9 got to -- they are not exempt in this state.

10 MS. THOMPSON: They're not exempt under
11 California law.

12 COMMISSIONER BROAD: They're not exempt, period.
13 You cannot -- how can you exempt them?

14 MS. THOMPSON: Well, they're exempt from federal
15 overtime, but they're not exempt --

16 MR. YOUNG: Now, Commissioner Broad, we
17 understand your distinction and we -- you're right,
18 you're correct -- and let our witness, if you could, just
19 describe the proposal. You are correct. In fact,
20 California law would be -- obviously, they would not --
21 they would not be exempted.

22 So let's --

23 MS. THOMPSON: You have to comply with
24 California.

1 MR. YOUNG: We'll move on with the proposal.

2 MS. THOMPSON: Right.

3 What this proposal is doing is it is basically
4 building into the California exemption the federal long
5 test, which includes a series of duties requirements that
6 have been historically utilized by the DLSE in
7 California, which include the exercise of discretion, the
8 ability to hire and fire, the direction -- responsible
9 direction of two or more employees, and in the context of
10 managerial work, that you're primarily engaged in -- that
11 your primary duty is managerial.

12 Now, in addition to those -- so we are -- we are
13 carrying forward what the DLSE has always used as
14 predicate duties for the exemption in California, taking
15 them out of the federal long test. Now we add the
16 quantitative requirement under California law, that the
17 employee must spend more than 50 percent of his time
18 engaged in exempt duties.

19 So, you will see in front of you what we say
20 here.

21 In Section (A), we say that, "The employee's duties and
22 responsibilities must satisfy the long test requirements
23 for the applicable exemption under the Fair Labor
24 Standards Act and pertinent regulations," and we cite the

1 specific ones so that people can refer back and see
2 exactly what we're talking about. And, in addition to
3 that, "More than 50 percent of the employee's working
4 time must be spent engaged in exempt work." And that is
5 the federal long test duties plus the 50 percent
6 "primarily engaged in" standard that comes out of Labor
7 Code Section 515(a).

8 For purposes of determining what are exempt
9 duties, in terms of determining if you're spending more
10 than 50 percent of your time engaged in exempt work,
11 we're also looking at the federal definition of what
12 duties are exempt and what duties are nonexempt.

13 And so, we refer back, again, to the pertinent
14 regulations and law under the Fair Labor Standards Act
15 that provides, I think, a very workable definition, in
16 the federal long test, of what exempt work constitutes.
17 And hopefully, it's not going to be terribly
18 controversial. I think it is -- if one reads those
19 regulations and reads the duties, it seems to me that it
20 is very consistent with the framework that is
21 historically the case in California and is acceptable in
22 California.

23 The test very specifically and explicitly, under
24 federal law, excludes working foremen. For example,

1 people who are spending too much time performed in work
2 of the same nature as their subordinates are not going to
3 be engaged in exempt duties. That kind of work is
4 defined as nonexempt under the Fair Labor Standards Act.

5 The benefit, I think, of this approach is that,
6 number one, I think it addresses the concern that was
7 raised last time, that somehow, in attempting a unique
8 definition of duties under state law, we undercut the
9 federal law or we somehow are acting in a way that's
10 inconsistent with the federal framework. And frankly,
11 it's also much easier, I think, from an employer's
12 standpoint. It's much easier to be dealing with a common
13 source of definitions rather than attempt to craft an
14 entirely new set of, you know, an enumerated list of
15 duties, as was tried last time, something like that. We
16 have consistency, and we have clarity, and we have the
17 ability to rely upon a volume of information that we can
18 turn to in understanding what we're talking about.

19 So, that is fundamentally what this proposal is
20 all about.

21 If you turn to the second page of the proposal
22 that's in front of you, the paragraph at the top talks
23 about, really, the methodology for conducting the
24 analysis of whether you are spending more than half your

1 time engaged in exempt work. And again, I think this
2 comes right out of the methodology that is described in
3 the *Ramirez* case and the methodology that the Department
4 has traditionally employed, in the sense that you look to
5 work actually performed during the course of the workweek
6 and you determine the amount of time that you're spending
7 on that work, and you allocate it as between exempt and
8 nonexempt. You figure out what work goes in this column,
9 what work goes in that column, add it up, and if more
10 than 50 percent of the time is spent in the nonexempt
11 column, then you're nonexempt.

12 This paragraph also incorporates, in the middle
13 of the sentence, some language out of the *Ramirez* case
14 where the Supreme Court said that it's appropriate also
15 to consider what the employer's expectations and the
16 realistic requirements of the job are. And that's
17 because it shouldn't be that an employer can set out a
18 set of requirements and have an employee not perform, you
19 know, the duties, basically by not -- not doing what he's
20 supposed to be doing, sort of move himself out of the
21 exemption. And the Supreme Court specifically addressed
22 that, and this incorporates that -- that language out of
23 the Supreme Court's decision.

24 The final paragraph, I think, is the paragraph

1 where there has been some controversy and some concern,
2 and I think this is really where the debate centers, as I
3 understand it. And let me try to describe to you briefly
4 at this point what we're really trying to address here.
5 Time devoted by an employee to exempt work is exempt time
6 for purposes of determining whether that employee is
7 primarily engaged in managerial work, even if the
8 employee is simultaneously or incidentally performing
9 other work, such as production, that might be
10 characterized as nonexempt.

11 Now, what that is trying to deal with is a
12 situation where an individual performs a combination of
13 tasks or duties in the course of their job. And the
14 realities of the way people work nowadays in this era of
15 multi-tasking, so to speak, is that people do, in fact,
16 do more than one thing. They are engaged in a variety of
17 activities. What I would really like the commissioners
18 to focus on, is the first eleven words of this paragraph
19 simply is saying that the time that an employee is
20 spending devoted to exempt work is exempt time, even
21 though the employee might be doing other things
22 incidentally. And that's -- that is not to say that
23 somehow, because the employee is doing -- you know,
24 again, has a managerial label on his forehead, that the

1 time he devotes in nonexempt work is exempt time. That's
2 not the objective, and that's not what we're saying here.

3 By illustration, just taking my own work as an
4 example, I prepare position statements or letters using
5 my computer. I am physically engaged in typing the
6 keyboard. I may, you know, rush out to the fax machine
7 and, you know, generate a fax cover sheet and fax a
8 document to my client. I regularly use the copying
9 machine. But those activities are incidental, it seems
10 to me, to the work that I'm engaged in, which is -- which
11 is work that would be considered exempt for purposes of
12 California overtime laws.

13 I think, similarly, you can make analogies in
14 the managerial context. A manager who is preparing a
15 report and who is using a computer to prepare that
16 report, that is incidental work. It is simultaneous. It
17 does not destroy the character of the work. That -- it
18 is -- it is directly and closely related, if you will, to
19 the performance of the exempt duty. That is basically
20 the concept that we are trying to capture here, that the
21 exemption is not somehow destroyed with respect to the
22 time that is devoted to exempt work because something
23 else incidentally or simultaneously is going on. And I
24 would suggest to you, those words "incidentally or

1 simultaneously" are narrow words.

2 You know, again, what we're trying to determine
3 here is the overall character of the work that the
4 employee is engaged in and attempt to fix that and count
5 only that time that is spent engaged in exempt duties.
6 And again, just to emphasize, production work or other
7 work that is unrelated or only remotely related to exempt
8 work is not exempt. We're not contending otherwise.

9 Okay. And there are many examples that we could
10 use to, I think, sort of flesh that out and try to get
11 comfortable --

12 MR. YOUNG: But, Mr. Chairman, that's the
13 essence of the proposal.

14 COMMISSIONER DOMBROWSKI: Right.

15 MR. YOUNG: Again, a work in progress. What we
16 would urge, again, those who have the language, to
17 perhaps, if they -- if they have suggested alternatives,
18 to try, if possible, to get them to us so we can, I
19 think, at least try to incorporate that into our draft.

20 MS. THOMPSON: Right.

21 And let me just briefly address the presumption,
22 which is the last sentence, in just -- just a minute,
23 just so that -- to try to put that in context too.

24 First of all, this was taken --

1 MR. YOUNG: Well, why don't we wait? When we
2 bring the final proposal to the Commission, at that
3 point, we'll deal with it. I mean, I think we've
4 exceeded our ten minutes. I was getting the signal.

5 MS. THOMPSON: Okay. All right.

6 COMMISSIONER BROAD: Yeah. Well, I do believe,
7 in the intervening months, you've improved the pitch, if
8 not the -- if not the essence of the pitch.

9 One, I don't agree with you that California
10 permits, under AB 60, Section 515 of the Labor Code, for
11 us to create legal presumptions that would affect
12 litigation. That's something that should be done in the
13 Evidence Code. And, in fact, I think it reverses
14 traditional presumptions in labor law altogether.

15 The fact of the matter is, if we -- if we leave
16 your example, because you're an attorney, so you're
17 exempt because of your licensure -- you can use Xerox
18 machines all day long and be exempt. The question really
19 is who we're really talking about here, which is the so-
20 called working managers, the person who is, in fact,
21 flipping burgers for 60 percent of their time, but you
22 would presume that burger-flipping time to be exempt time
23 for the purpose of the law, which is in conflict in
24 principle with the strictly -- the strict test which is

1 an allocation of time between exempt and nonexempt
2 duties. You either are or you are not spending more than
3 50 percent of your time.

4 I agree with you that if a manager is sitting in
5 the manager's office and goes and sharpens his or her
6 pencil and then goes and writes a report that says, "I
7 believe that X, Y, and Z Employee should be terminated
8 immediately," that the fact that they're sharpening the
9 pencil is an incidental activity. However, if they're
10 spending 25 hours a week sharpening pencils, and that's
11 what they're doing, the fact that they have other
12 managerial duties is pretty irrelevant if what they do is
13 -- they are a pencil-sharpener.

14 MR. YOUNG: But, Commissioner Broad, I think
15 what we're trying to do is craft something so that -- I
16 mean, we keep talking about flipping burgers and
17 sharpening pencils in a wired world, where the reality
18 is, is that most people have desktop computers, and most
19 people have either networked or their own personal
20 printers. And now, I think, the age of have a secretary
21 come in and we'll dictate to them, I think that is long
22 since past. It is, at best, the exception, not the rule.
23 And yet there are people like myself, who might spend one
24 or two days just writing letters. They have to come over

1 to the building and do nothing more than work on my
2 computer, yet I'm clearly a manager of the -- I mean, you
3 know, certainly, I have responsibilities --

4 COMMISSIONER DOMBROWSKI: To be -- to be
5 specific, though, the proposal calls for the -- skip over
6 -- I mean, we know we're talking about the presumption,
7 but this proposal is calling for fulfilling all of the
8 duties spelled out in the long test. So, as a practical
9 matter, I would assume that you wouldn't be able to
10 satisfy all of those duties. You'd -- I mean, you have
11 to satisfy all the -- do all those duties more than 50
12 percent of the time. That's still the heart and essence
13 of this proposal.

14 COMMISSIONER BROAD: Well, I just find that
15 Paragraphs (A) and (B) are in conflict with the last two
16 paragraphs, altogether. They're just in fundamental
17 conflict.

18 I think there probably is -- I think it's a fair
19 criticism, from the point of view of employers, that we
20 have had, since 1947, a rule as to the duties that is
21 referred to federal law in its enforcement, but we don't
22 actually set out how to define that, and I think there
23 probably is room for discussion about whether the federal
24 long test or aspects of the federal long test may be used

1 to determine what are the duties.

2 But as to the allocation of time between those
3 duties and nonexempt duties, I think AB 60 is absolutely
4 clear on its face that it is a strict quantitative test,
5 and that you can't count, ever, nonexempt duties as
6 exempt duties or presume them to be exempt duties, or
7 discount them because you're thinking of something else
8 at the same time, or anything of the sort. That statute
9 was written clearly, and the legislative history is
10 clear, and the language is clear on its face, to codify
11 existing IWC practice as -- with a strictly quantitative
12 test that is the subject of numerous court decisions that
13 have interpreted that, and not to introduce change to
14 presumptions or alter the burden of proof in litigation
15 or anything of the sort.

16 So, I think the last paragraph of this proposal,
17 at the very minimum, should probably disappear. And if
18 there's something to discuss at the next hearing on this
19 matter, it should be confined to what are the duties that
20 meet the test of the exemption.

21 Now, let me also point out that we are allowed
22 to consider, only in this context, what is the definition
23 of exempt versus nonexempt duties. We have no legal
24 ability to consider, without convening wage boards,

1 anything having to do with time devoted to one versus
2 time devoted to the other. So I don't even think that
3 that paragraph is properly before the Commission, even if
4 it was lawful, which it's not.

5 So I have a fundamental problem with it. And I
6 appreciate the work that's been done on it, and I think
7 that there's a possibility of reaching some issue
8 compromise here with respect to the definition of duties,
9 importing the federal long test, which I think we have
10 done all these years, but not to fundamentally change the
11 law.

12 MR. YOUNG: Mr. Chairman, with that, we'll
13 conclude our presentation and take to heart what
14 Commissioner Broad said and continue to try to work with
15 him and others to try to craft something that perhaps we
16 can bring before you in June, with some -- I know it
17 would be precedential for this -- for this Commission,
18 but with some degree of unanimity in it.

19 Thanks.

20 COMMISSIONER DOMBROWSKI: Mr. Abrams.

21 MR. ABRAMS: Mr. Chairman, a question of process
22 and procedure. Jim Abrams, with the California Hotel and
23 Motel Association.

24 And we too applaud the efforts of the Commission

1 to try and get some clarity as to what does and what does
2 not constitute exempt duties. As you know from our prior
3 testimony, we have a lot of people in the industry --
4 there apparently is a proposal before the Commission at
5 this point in time. Is that something -- did I infer
6 correctly from the testimony that was just given?

7 COMMISSIONER DOMBROWSKI: Yeah.

8 MR. ABRAMS: Okay. I mean, I don't quibble with
9 that. You know, I just --

10 COMMISSIONER DOMBROWSKI: We're having
11 discussions back and forth. We've noticed it three
12 times, and we'll be happy to give you a copy of what we
13 have at this point.

14 MR. ABRAMS: No, no. I don't quarrel with the
15 fact that there's something there. I just think that
16 people -- not only my association, my employer, but other
17 employer and employee groups, just need to know what the
18 process is.

19 So, if -- is this something that's going to be
20 made available so -- well, several questions.

21 First of all --

22 COMMISSIONER DOMBROWSKI: Yes, Jim.

23 MR. ABRAMS: First of all, is this a work in
24 process on behalf of the Retailers Association or -- and

1 the reason -- the reason -- let me finish the question so
2 you can maybe understand. I -- I want to make sure that,
3 to the extent that there are issues specifically relevant
4 to lodging, food service, or any other group of
5 employment situations, that they are --

6 COMMISSIONER DOMBROWSKI: Jim, I'll be happy --
7 in the interests of -- I'd be happy to give you the
8 proposal and let you look at it, and we'll receive your
9 comments as part of the process over the next 30 days.

10 MR. ABRAMS: Thank you.

11 COMMISSIONER BOSCO: Could I interject here for
12 a second? One of the things that really concerns me is
13 that there seems to be an issue over how much of this, if
14 any, is within our jurisdiction vis-à-vis -- vis-à-vis AB
15 60. Can we, before such time as we really take this up
16 in earnest, which I'm sure we're going to, have
17 substantive opinions on that so -- because it doesn't
18 seem to me that it's wise to, you know, waste anyone's
19 time if we --

20 COMMISSIONER DOMBROWSKI: Sure, yeah.

21 COMMISSIONER BOSCO: -- if we really aren't sure
22 that we're on pretty firm legal ground.

23 COMMISSIONER DOMBROWSKI: Duly noted.

24 Mr. Rankin.

1 MR. RANKIN: Well, I'm glad to know that labor
2 wasn't the only one that didn't get everything before the
3 meeting, although, actually, we got this proposal
4 yesterday. But again, I must say, procedurally, this
5 doesn't work. And I'm glad that at least you put this
6 over.

7 But we got this yesterday. And what we got
8 today, you didn't put over. So there are basic
9 procedural problems with the Commission. I thought it
10 was going to be different under this administration, but
11 it apparently has gotten worse than it used to be,
12 because I've been dealing with this Commission for many,
13 many, years.

14 In terms of this proposal, in terms of the
15 federal long test -- we have some attorneys here who will
16 probably speak to that -- I'd like to make one comment.
17 It doesn't work to do IWC orders by referencing the CFR.
18 If you're going to do a regulation and it's supposed to
19 be posted there for the workers to see, you'd better damn
20 well spell out what you're talking about instead of
21 saying, "29 CFR blah-blah-blah, ABCD 551," and so forth
22 and so on. The purpose of the wage orders is to inform
23 the employees of what their rights are. This does
24 nothing to do that.

1 So, we have lawyers, luckily, who've read it.
2 But on the second page of the proposal, what this
3 basically represents is a much more sophisticated way of
4 doing what you were trying to do a couple months ago when
5 we had 800 people here objecting to it. You are trying
6 to get around the "primarily engaged in" test that is now
7 enshrined in the statute and substitute something else
8 for it.

9 AB 60 gave you the authority to look at the
10 duties. It didn't give you authority to change the
11 "primarily engaged in" test. And this cute little
12 backdoor method, this proposal, does exactly that. First
13 of all, it says you're supposed to be -- when you're
14 looking at the work performed by the employee, you're
15 supposed to consider the employer's expectations. What
16 do the employer's expectations have to do with the actual
17 work that's being performed? Maybe nothing, maybe a lot.
18 But the employer's expectations are irrelevant.

19 Then, in the second paragraph, Mr. Broad pointed
20 out the problem there. You can be simultaneously engaged
21 in production -- and it says production -- you can be
22 working on the assembly line and thinking managerial
23 thoughts, doing managerial things in the back of your
24 mind, and that time, according to this proposal, is

1 managerial time. Simply another way, a more
2 sophisticated way, of trying to do what we rejected and I
3 thought you rejected last time.

4 So, that's all I have to say. But one other
5 thing procedurally: I mean, if you're going to work on
6 this, I presume you post -- you post this proposal, you
7 put it out in a public notice, and you take amendments to
8 it. It's not just some proposal that's floating around
9 that a few people happen to get. That doesn't work.

10 MS. BERMAN: My name is Marcie Berman, and I'm
11 here as a representative of the California Employment
12 Lawyers Association.

13 I did get a copy of this proposal yesterday, and
14 I very quickly ran off a letter to you all, which I
15 delivered this morning that, hopefully, you have copies
16 of. And I'm not going to reiterate the points that I
17 made in there. I just want to quickly note for the
18 record that I'm upset and concerned about the lack of
19 notice, and so I am glad that the Commission has put off
20 any kind of decision-making until next time around. And
21 I would hope that whatever is going to be under serious
22 consideration will be noticed to the public before that
23 hearing.

24 A couple things about the federal, quote, "long

1 test" that people have been talking about. I just want
2 to point out that there are a few respects in which the,
3 quote, "long test" itself differs from California law, so
4 that importing it wholesale -- we wouldn't be importing
5 it because most of it already is what's used by the DLSE
6 and the courts, it's just not specifically stated in the
7 wage order -- but it is what was originally intended and
8 what is used to define the law. But there are a couple
9 aspects of it that are different.

10 And in particular, the professional exemption
11 under California law has long been different than what's
12 under the federal law by enumerating the specific
13 licensed professions. And this proposal doesn't take
14 account of that, so that's a problem. And in particular,
15 it would have severe consequences legally in terms of
16 nurses and pharmacists, who statutorily now are
17 specifically made not professionals. That's one issue.

18 Another issue is the California -- the wage
19 orders have always applied the discretion and independent
20 judgment test, which is something that's in addition to
21 defining the duties. They've always applied that
22 discretion and independent judgment test to the
23 executive, administrative, and professional exemption,
24 whereas, under the federal regulations, they've used that

1 particular test only with respect to the administrative
2 exemption. And the good thing about that test, as
3 compared to the ones that the federal law uses for
4 executive and professional, is that there's quite a
5 lengthy, detailed, comprehensive definition of it in the
6 regulations and the cases. So as the speaker for the
7 employers' group said, it's nice to have a definition
8 where we all know what it means. And California has
9 always used discretion and independent judgment with
10 respect to all three of those exemptions.

11 And I wanted -- I did actually bring some
12 archives from the basement of the Division of Industrial
13 Relations' old wage orders, starting with 1943, and then
14 the minutes from 1947 where these three exemptions were
15 first adopted, and then wage orders spanning from 1947
16 through '57. And I just want to give them to you for the
17 record to show that the discretion and independent
18 judgment has been there, applied to executive,
19 administrative, and professional, all along.

20 And the other thing that this proposal doesn't
21 mention is the salary test, which I'm sure was just an
22 oversight. But that would have to -- to be in there.

23 I'm not going to reiterate what my letter
24 addresses with respect to these two paragraphs at the top

1 of the second page, and also with respect to the
2 "Statement of Basis," but I would ask that you read my
3 comments.

4 I do want to note, though, that there's, I'm
5 sure, an inadvertent factual predicate error in here.
6 There's a reference in here, on the last page of the
7 proposal, to DLSE Memorandum 93.5, and it specifically
8 references Page 46.6. Yesterday, scrounging around to
9 try and find a copy of this, I was able to put my hands
10 on two different versions, one which is -- appears to be
11 official, and one which appears to be something other
12 than official, which is the one that is referenced in
13 here, and they are dramatically different with respect to
14 this point that you've cited it for.

15 The -- Page 3, the last paragraph, cites to Page
16 46.6, and the version of that that's got those pages on
17 it comes from a commercially published employer-oriented
18 legal manual that's drafted by Albry and Long on
19 California overtime law. And that's the version that's
20 got the language that you're relying on for your last
21 paragraph.

22 However, I -- I also contacted the Division of
23 Labor Standards Enforcement, the legal office, and asked
24 them for a copy, and what I was given as their official

1 copy is something that's in their 1995 -- it's from their
2 1995 Hearing Officers Training Manual. It's got the same
3 memorandum number on it, same date, and, lo and behold,
4 the last page of it doesn't have that language.

5 COMMISSIONER DOMBROWSKI: Can we have copies of
6 that, please?

7 MS. BERMAN: Yes.

8 COMMISSIONER DOMBROWSKI: Okay.

9 MS. BERMAN: I'll give you both copies.

10 COMMISSIONER DOMBROWSKI: All right.

11 MS. BERMAN: So, I have a feeling that, perhaps
12 inadvertently, the version of it that was relied on here
13 was maybe a draft or some unofficial version. I don't
14 know.

15 That's it.

16 MR. WETCH: Mr. Chairman --

17 COMMISSIONER DOMBROWSKI: It's not going to
18 affect the construction industry.

19 MR. WETCH: Pardon me?

20 COMMISSIONER DOMBROWSKI: Whatever we have is
21 not going to affect the construction industry.

22 MR. WETCH: Well --

23 COMMISSIONER DOMBROWSKI: If we ever end up with
24 anything, it will exclude the construction industry.

1 MR. WETCH: On behalf of the State Building and
2 Construction Trades Council, we welcome the narrowing of
3 this amendment, and we'll reserve the right to make
4 comment if it should ever change in the future.

5 And thank you.

6 MR. McKINNON: Have you excluded manufacturing?

7 MR. RANKIN: What is covered?

8 COMMISSIONER DOMBROWSKI: I haven't figured that
9 one out yet, so we'll keep you at the table for now.

10 MR. RANKIN: But seriously, what are you saying
11 -- is this covers which wage orders?

12 COMMISSIONER DOMBROWSKI: No, Tom. We haven't
13 figured that out yet. It's not coming up for a vote.

14 MR. McKINNON: My name is Matthew McKinnon. I
15 work for the California Conference of Machinists. It's a
16 state council of the machinists union representing about
17 100,000 folks here in the state.

18 And I guess I'd like to talk about this a couple
19 of different ways.

20 First of all, as you've heard over and over
21 today, on procedural grounds, I have a lot of difficulty
22 with what's gone on today. I got a copy of this this
23 morning. I did not get it from this agency; I received
24 it from someone else. My original notice, I did not

1 receive, and I have difficulty with the process. I think
2 we've talked about that over and over today. I'm sure
3 you get the point.

4 But part of the difficulty is analyzing this
5 proposal for whether or not it works. It makes it very
6 difficult to testify with any intelligence about what
7 this does, in effect, to our members and to people that
8 work in the industries that we represent.

9 So I'm going to -- I'm going to tell you that I
10 think you should not move on anything if the public has
11 not had a chance to look at it and talk about it. That's
12 first.

13 Second is more of a -- kind of a discussion
14 about the orientation of how we're forming policy in this
15 state. We're a state -- and I think somebody talked
16 about it a few minutes ago -- this is -- you know, this
17 is the age of the Internet and -- and so on. We're
18 forming public policy here on how workers relate -- how
19 management and workers are separated based upon retail --
20 a retailer's objective -- this is the retailers'
21 proposal. Did I miss something, or is that what this is?
22 Or is it fast food or -- I'm not sure what it is.

23 But I'll tell you something. In manufacturing,
24 if we want to be good at manufacturing, if we want to

1 have any left in this state long-term -- and I don't mean
2 design in Silicon Valley, I mean manufacturing, where
3 people make things -- part of the clue there is that the
4 workers are able to shift production quickly and make
5 good products fast and new products fast into the market.
6 And in the machinists union, there's a number of places
7 where workers do lots of what would be considered exempt
8 work in saving companies. Harley-Davidson was saved that
9 way. United Airlines, bit strides have been made that
10 way. U.S. Air wouldn't be here if the workers hadn't
11 taken over many of the salaried kind of jobs in
12 reinventing that corporation, and now -- now United
13 Airlines is going to pick it up. H.R. Textron, in
14 southern California, the workers engineered, by
15 purchasing the equipment, by thinking about how they
16 would buy the new equipment, they engineered a doubling
17 of the workforce and more than doubling of the product
18 sold, in that facility.

19 So, essentially, this public policy that's being
20 developed here is backwards. We should want -- we should
21 want hourly workers to be encouraged to be part of the
22 process of thinking and deciding and making things work
23 in a company. And they should never have to fear
24 economic loss for -- for participation in processes that

1 help guide a company into more modern manufacturing. So,
2 this is actually policy that would take us back to the
3 days when Taylor was inventing the way industrial
4 processes should be done. This is backwards. This is
5 going backwards to the beginning of the century, the
6 beginning of last century, not forward.

7 So, with that, I think that there should not be
8 any action today. I don't think there's been notice. I
9 haven't seen the federal list in years. I didn't know
10 you were negotiating on that. And -- but frankly, I
11 think the outlook and the approach is one that takes us
12 backwards, not forward.

13 MS. GATES: My name is Patricia Gates, and I'm
14 with the Law Offices of Van Bourg, Weinberg, Roger, and
15 Rosenfeld.

16 And as a matter of basic due process and
17 fundamental fairness, the IWC must refrain from acting on
18 a new proposal until after it has been noticed to the
19 public and there has been an appropriate period for
20 public comment. This Commission should have refrained
21 today from acting on the regulations it adopted on the
22 alternative workweek and on the secret-ballot elections.
23 AB 60 did not expand this Commission's powers to act
24 contrary to the interests of working people in this

1 state.

2 I am pleased to see that it is now refraining
3 from acting on a proposal to expand the definition of
4 managerial duties. I am very displeased that it has
5 already acted in a way that is contrary to the intent of
6 the Legislature, contrary to the interests of the working
7 people of this state, and contrary to the construction --
8 the statutory construction that remedial legislation
9 should be interpreted so that it is in the interests of
10 the people intended to be protected by that legislation.

11 Expecting us to comment today on a proposal that
12 we saw only minutes before violated fundamental due
13 process.

14 MR. HOLOBER: Richard Holober, California Nurses
15 Association.

16 We're opposed to the proposal. We're opposed to
17 the entire concept behind the proposal, for a couple
18 reasons.

19 One, I think AB 60 clearly states out the
20 "primarily engaged in" standard. There's a reason we did
21 that. We put it in the statute because it was in the old
22 wage orders, but there were efforts to eliminate it from
23 the old wage orders. So, when we wrote AB 60, we decided
24 to take it out of the hands of the Industrial Welfare

1 Commission. This is an effort to put that back in your
2 hands, and I think your hands are very clearly tied by
3 the law.

4 What we're talking about here is this kind of
5 fiction, you know, this dream-world notion that while
6 you're, you know, flipping hamburgers, or -- or, you
7 know, shoveling dirt, or whatever it is, in your mind,
8 you're a manager, that what's happening in your mind
9 defies the logic -- the real-life work that you're
10 performing, and if you're thinking about some managerial
11 duty, you know, "Gee, I'm going to assign this person to
12 do this or that person to do that," forget what you're
13 actually doing, what your -- what your body is actually
14 doing; all that matters is what's going on in your mind.
15 If that was true, I think everyone would be a manager,
16 because, in our minds, we would all not really want to
17 have to be doing the kind of, you know, physical labor
18 that many people do. But you can't really make that
19 change, because the law is very clear under AB 60. And
20 you look at the actual work you're doing, not some
21 theoretical concept, "Gee, what is this person thinking
22 about while they're actually performing some other duty?"

23 The purpose of the Industrial Welfare Commission
24 is to protect the health and welfare of workers. And

1 before you change things, it has to be based upon some
2 evidence that the current status quo is detrimental to
3 the health and welfare of workers. That's the only
4 reason the IWC exists, is to protect workers. It is not
5 a commission to give management goodies. There -- you
6 know, there are other agencies here that promote all
7 kinds of industries in California. That's not your job.

8 So, I haven't heard any evidence that says that
9 workers are being screwed or shafted because they are
10 getting overtime pay. What you'd need to -- to show
11 here, I think, is that someone who makes twice the
12 minimum wage -- we're talking about like a \$20,000-a-year
13 worker -- really needs to work 60 or 70 or 80 hours,
14 because working only 40 hours is really bad for them.
15 And that's the basis that you would need to proceed.

16 In fact, the last time around when there was a
17 proposal like this, it was voted down by the Wilson IWC
18 because there was no basis and evidence that workers were
19 clamoring for this change.

20 I'd just add one other point, which is that, as
21 it affects nurses, from what I heard from the employer
22 side, I think this would provide an end run for employers
23 to reclassify nurses not as professionals, but as
24 administrators or executives. Now, the law clearly says

1 that a registered nurse is protected, has overtime, even
2 though that nurse is a professional, unless the nurse is
3 also functioning as an administrator, like the director
4 of nursing for a hospital, someone who clearly is high in
5 the hierarchy, with the ability to hire, fire, and so
6 forth.

7 But the testimony I heard that speaks to things
8 like directing work of other workers, that's part of the
9 professional duties of a nurse. Nurses work with LVN's
10 and unlicensed assistive personnel, and part of their job
11 and part of their license requires that they direct the
12 work of those other employees, not in the sense of hiring
13 and firing, but of understanding what's going on with the
14 patients, and on occasions, on a regular basis, assigning
15 who should be doing what or who should be covering what
16 assignment. That's clearly part of their professional
17 definition. It is not a managerial definition, but if
18 I'm hearing correctly from the employer testimony, that
19 would be reclassified here as part of the managerial
20 function, and nurses would lose exemption if this kind of
21 proposal went through.

22 Thank you.

23 COMMISSIONER DOMBROWSKI: Thank you.

24 MR. CAMP: Mr. Chairman and members, my name is

1 Bill Camp. I'm here representing the Sacramento Central
2 Labor Council.

3 The concern I wanted to raise is partly a
4 broader perspective on what Mr. McKinnon has raised,
5 which is you do set workforce investment policy, that the
6 Industrial Welfare Commission, in this particular area,
7 is really setting policy for how we develop the
8 workforce. And we come, in today's employment arena,
9 with this notion that we've got to change the way we
10 manage and develop and grow the workforce. Part of the
11 concept that we bring to the table is a sense of
12 partnership, and there's a real sense of "gotcha" that
13 got played today with this health plan. And so, it
14 breeds a sense of suspicion and questioning about our
15 government when we feel like they are playing "gotcha,"
16 and when we're, on the other hand, saying if we don't
17 develop this economy and grow this economy as workers, we
18 need to develop some sense of a partnership with those
19 people in government and with those people in the
20 employment sector who are trying to change the economy
21 and grow it -- build it in a way that makes it a flexible
22 economy that creates high skills and high wages.

23 We can't build a high-skill and a high-wage
24 economy when we're -- when there's not that underlying

1 sense of trust. And so, the way in which this issue gets
2 raised with us undermines the notion of what we're trying
3 to build here as we grow this economy.

4 So, I appreciate the fact you're not going to
5 decide on it today, but I'm worried about the fact -- am
6 I going to get a notice that tells me who it is going to
7 affect? Because I represent workers in this area and can
8 go to them and say, "The Commission's going to meet today
9 and talk about your issue," and they said, "Well, I don't
10 know whether they're going to talk about something that
11 affects my work or not," so that as we think about the
12 kind of notice and the kind of preparation that we need,
13 as a group of workers, we're looking for a way to engage
14 our members in this process. And we appreciate any
15 effort you can make to help us accommodate that.

16 Thank you.

17 COMMISSIONER DOMBROWSKI: Item Number 6,
18 consideration of whether to extend the provisions of
19 Interim Wage Order 2000 to the effective date of
20 amendments adopted at this hearing or at a hearing
21 concluded on or before July 1st, 2000, pursuant to Labor
22 Code 517(a).

23 Mr. Baron.

24 MR. BARON: The issue is under -- relating to AB

1 60, in a number of areas, talks about the issue of July
2 1. 517(a) says, "The Industrial Welfare Commission,
3 shall, at a public hearing to be concluded by July 1,
4 2000, adopt wages, hours, and working conditions," so
5 it's -- however, there's -- there's clearly time from the
6 time that you adopt to the time that -- dealing the
7 "Statement as to the Basis," dealing with publishing, all
8 those things can affect -- can deal with the effective
9 date. So there's language here being proposed that would
10 relate both to actions taken at this hearing and actions
11 taken -- whatever action that would be taken at a June --
12 at any other hearing before July 1st, which the
13 Commission needs to adopt.

14 And what the -- what has certainly been learned
15 from the time that it took to deal with one wage order,
16 the interim wage order, here the Commission now is facing
17 making changes in Orders 1 through 15, as well as the
18 interim, so that's 16 wage orders. Clearly, there will
19 be a lot involved in making sure that that, in the end,
20 is put in the proper form and issued through the proper
21 entities.

22 So, the language here says that:

23 "Any action taken by the Commission at this
24 hearing to adopt wages, hours, and working

1 conditions orders will be taken pursuant to the
2 provisions of Labor Code Section 517(a). In
3 furtherance of that section, the effective date
4 of such actions taken at this public hearing as
5 well as at a public hearing to be held in June,
6 will be October 1, 2000. The remaining
7 provisions of Interim Wage Order 2000, as well
8 as Wage Orders 1 to 15 as are currently in
9 effect, shall remain operative until that
10 effective date. If the IWC takes action to
11 amend the interim wage order, Sections 5(K),
12 (L), (M) and/or (N) --
13 -- that relates to the specifically delineated
14 occupations and industries, such as fishing, skiing,
15 stable employees --
16 so if the IWC takes action to amend the interim wage
17 order in those sections, the provisions of those
18 subsections currently in effect shall not expire on July
19 1st.

20 COMMISSIONER DOMBROWSKI: Okay. Any questions?

21 COMMISSIONER BROAD: Yes. Mr. Baron, my
22 question is -- a couple questions.

23 First, this motion that we're adopting, is this
24 intended to be part of any wage order, or we're just

1 adopting this as a motion? It's not going to appear in
2 print anywhere?

3 MR. BARON: No.

4 COMMISSIONER BROAD: Okay.

5 MR. BARON: It is just -- it is just the
6 Commission issuing its will in terms of the -- making
7 clear the timing of the effective dates.

8 COMMISSIONER BROAD: Okay. Let me ask you this
9 question. We conclude on June 30th our deliberations of
10 AB 60, and we do whatever we do on that wild day --

11 MR. BARON: Right.

12 COMMISSIONER BROAD: -- and it's done. And
13 therefore, you know, 15 wage orders have to be changed.
14 Is it possible that they will be rolled out serially,
15 between that time and October 1st?

16 MR. BARON: I don't -- I don't know the answer.
17 At that point we'll have to see when --

18 COMMISSIONER BROAD: Well, here's -- well,
19 because I -- because, it seems to me, like as you
20 complete them, they would be -- so, I guess what I'm
21 suggesting is that maybe it should say -- taking -- in
22 Line 5 --

23 MR. BARON: Okay. So, what do you want to say?
24 "Up until" --

1 COMMISSIONER BROAD: "Be no later than October
2 1, 2000."

3 MR. BARON: Okay.

4 COMMISSIONER BROAD: Would that be --

5 MR. BARON: I think that's fine.

6 COMMISSIONER BROAD: Okay.

7 COMMISSIONER DOMBROWSKI: Any other questions?
8 Do we just adopt this?

9 MR. BARON: Yeah, just make it a motion.

10 COMMISSIONER DOMBROWSKI: Wake up, people. Can
11 I get a motion?

12 COMMISSIONER BROAD: I'll move this item as
13 amended.

14 COMMISSIONER DOMBROWSKI: Second?

15 COMMISSIONER COLEMAN: Second.

16 COMMISSIONER DOMBROWSKI: All in favor, say
17 "aye."

18 (Chorus of "ayes")

19 COMMISSIONER DOMBROWSKI: Item 7, consideration
20 of appointment of members to the Wage Board established
21 to review the adequacy of the minimum wage, in accordance
22 with Labor Code Section 1178.5.

23 I think, Andy, you have the names. Could you
24 just read those off for the record?

1 MR. BARON: For the employee representatives:
2 Rosalina Garcia, Christine Vasquez, Janet Wright, Maximo
3 Carbuccia, Tho Do -- please, I apologize if I'm
4 mispronouncing any of the names -- Rosalinda Guillen, Tom
5 Rankin -- I think I pronounced his name right -- Ron
6 Lind, and the alternates would be James Duval and Roy
7 Hong.

8 And the employer representatives: Roy Gabriel,
9 Willie Washington, Sam Manolakas, Lee Vierra, Julianne
10 Broyles, Tom Luevano, Jim Abrams, Douglas Cornford, and
11 the alternates, Bruce Young and JoLinda Thompson, and the
12 chair, Fred Galves.

13 COMMISSIONER DOMBROWSKI: Anything else?

14 MR. BARON: You need to approve the --

15 COMMISSIONER DOMBROWSKI: Need a motion?

16 COMMISSIONER BROAD: I can just say there will
17 not be any lobbyists left in Sacramento, if anything
18 happens --

19 (Laughter)

20 COMMISSIONER DOMBROWSKI: Which may be an
21 advantage.

22 COMMISSIONER BROAD: So moved.

23 MR. RANKIN: (Not using microphone) I have a
24 question.

1 My understanding is that there was a deadline
2 for getting nominations in to this wage board, and that
3 there was not -- there was some unhappiness with some of
4 the employer nominees, and others were added after that
5 deadline. I just have a question about this whole
6 procedure, given all the other procedural problems we're
7 facing today.

8 How does this work? The deadlines for getting
9 in nominations mean nothing?

10 COMMISSIONER DOMBROWSKI: We, on the past wage
11 order, took nominations as well -- up to the time,
12 because we -- we didn't have enough names. So, we have,
13 procedurally, done this on the previous wage order that
14 we formed -- or wage board -- I'm sorry.

15 The question was either we would have to take a
16 vote to extend the deadline to get more names, which I
17 understood was not desired by organized labor, so we
18 tried to accommodate, to move this thing forward, with
19 the
20 right --

21 MR. RANKIN: No, because we want to get the
22 minimum wage increased as expeditiously as possible. But
23 there were a number of names. What do you mean,
24 "adequate number of names"? I mean --

1 COMMISSIONER DOMBROWSKI: Frankly --

2 MR. RANKIN: -- if you're -- if you're going to
3 operate this way, you'd better say to the whole world,
4 "We're going to take nominations up until the minute we
5 meet, or up until two hours after we start meeting," so
6 the world knows, not just one side knows. I mean, this -
7 - this whole thing about the way a public body operates
8 is just very, very disconcerting.

9 COMMISSIONER DOMBROWSKI: The reality was that
10 if we didn't take names today, we were going to have a
11 smaller board, and I was informed that organized labor
12 wanted more people on the wage board.

13 MR. RANKIN: We do want more people on the wage
14 board, and you had at least, from us, I think, ten or
15 twelve names. You had at least ten or eleven from the
16 employers. Are you making a wage board that's bigger
17 than that?

18 COMMISSIONER DOMBROWSKI: The qualifications of
19 some of the employer reps were disputed.

20 MR. RANKIN: Well -- well, let's discuss that,
21 then. What is a "qualified" employer representative?
22 Let's hear the qualifications. Does the fact that a
23 person works for a small business in San Francisco
24 disqualify that person? Does the fact that an employer

1 happens to manage a nonprofit organization disqualify
2 that person? Those are probably the employers who
3 actually employ minimum-wage workers, unlike the
4 lobbyists who've been named to this wage board.

5 COMMISSIONER COLEMAN: Well, one option is,
6 then, that we can publicly extend the deadline and
7 postpone voting on wage board members till next month.

8 MR. RANKIN: Well, the other option is you
9 simply name wage board members from the list you got
10 legitimately that was presented to you by the deadline
11 for making nominations.

12 COMMISSIONER BOSCO: Well, it looks to me like
13 there's two complaints here. One is the content of the
14 list and whether it's lobbyists or people that are
15 representing minimum-wage employers or not, and that's
16 one category. The other is the timing of when the list
17 is decided on. Is that correct?

18 MR. RANKIN: Well --

19 COMMISSIONER BOSCO: Did you want us to exclude
20 all lobbyists from the list?

21 MR. RANKIN: I'm not -- I'm not proposing that.
22 I'm proposing that if you're going to -- if you're going
23 to set out -- just now I just heard that the objection to
24 the original list was people weren't qualified. Well, if

1 you're going to have qualifications for being on a wage
2 board, other than the broad qualification of representing
3 employers or representing labor, then they'd better be
4 spelled out so that a lot of people don't waste their
5 time putting in their nominations, to find out, "Oh, my
6 God, because I happen to manage a nonprofit organization,
7 I'm not qualified."

8 COMMISSIONER BOSCO: Well, that's probably a
9 good commentary. I mean, do we have any qualifications
10 to be on a wage board?

11 (Laughter)

12 COMMISSIONER BOSCO: Other than general
13 employee-employer breakdown?

14 COMMISSIONER DOMBROWSKI: No.

15 COMMISSIONER BOSCO: I didn't think so.

16 COMMISSIONER BROAD: At the risk of telling the
17 truth about how this has always worked, the way it has
18 worked is that typically, in the twenty years I've been
19 around the process, is that names are -- come forth from
20 sort of the labor side, and the labor representatives
21 pick those people, and names come forth from the employer
22 side, and the employer representatives on the Commission
23 tend to pick those. And the poor public member picks the
24 chair. That has been kind of the custom, though not a

1 rule. And that is a custom intended to make sure that
2 one side doesn't try to appoint people to the other side
3 that would skew the process sort of inappropriately or
4 something.

5 What occurred here is that the employer
6 community dropped the ball and didn't -- and no one --
7 not enough people sent in -- enough employers sent in,
8 but not enough employers sent in that the organized
9 employer community approved of. And so, they -- what
10 their -- I think their concern is, is that the people
11 that met -- that some of the people that met the
12 appropriate deadline as employers, it's not that they're
13 not employers, but they may not be employers who are as
14 unsympathetic to raising the minimum wage, or changing
15 the minimum wage or whatever, as the organized employer
16 community would prefer. That's the truth.

17 Now, having said that, we now -- we are faced
18 with sort of a choice of whether we move forward with the
19 motion to name the people that we have named, or we delay
20 this. It is my view, as someone who believes the minimum
21 wage needs to go up and needs to go up as soon as
22 possible, that at this time I would like to pursue the
23 motion that I made. However, I think a cautionary
24 message is sent out to the employers: Don't do that

1 again. When we're setting wage boards, get your names in
2 and, you know, take care of the problem, and then the
3 issue will not arise.

4 COMMISSIONER BOSCO: Maybe we should have a voir
5 dire process like they do in choosing juries, you know --

6 COMMISSIONER COLEMAN: There you go.

7 MS. BROYLES: If I might be permitted, Mr.
8 Chairman, Julianne Broyles, from the California Chamber
9 of Commerce, also a member, along with Mr. Rankin, of the
10 minimum wage board that is being discussed -- potential
11 member.

12 I would have no problem with the minimum wage
13 board being renoticed, having the notices go back out,
14 and reappointing, and underneath all of the rules, tacit
15 or otherwise, that have been done here today. So, just
16 so you know that the organized employer community, if
17 that's what you really want to call us, can be more
18 organized in the future. We would be happy to see that
19 happen.

20 COMMISSIONER DOMBROWSKI: I believe we have a
21 motion. Do we have a second?

22 COMMISSIONER COLEMAN: Second.

23 COMMISSIONER DOMBROWSKI: All in favor, say
24 "aye."

1 (Chorus of "ayes")

2 COMMISSIONER BROAD: Mr. Chairman, if I may be
3 recognized.

4 COMMISSIONER DOMBROWSKI: Sure.

5 COMMISSIONER BROAD: You have in your packets a
6 draft charge to the minimum wage board.

7 COMMISSIONER DOMBROWSKI: Right.

8 COMMISSIONER BROAD: I would ask whether it's
9 necessary to read that into the record or we can just
10 move its adoption.

11 COMMISSIONER DOMBROWSKI: I believe we can just
12 move it.

13 COMMISSIONER BROAD: Okay. Therefore, I would
14 move the adoption of the charge to the minimum wage board
15 as it appears in your packets.

16 COMMISSIONER BOSCO: Second.

17 COMMISSIONER DOMBROWSKI: All in favor, say
18 "aye."

19 (Chorus of "ayes")

20 COMMISSIONER DOMBROWSKI: Item Number 8,
21 reconsideration of actions whereby the IWC voted to
22 convene a wage board regarding employees who work as
23 certain computer industry consultants and voted to
24 appoint wage board members.

1 COMMISSIONER COLEMAN: Mr. Chairman, I would
2 move that we table this in light of the pending
3 legislation on this topic.

4 COMMISSIONER BROAD: Mr. Chairman, point of
5 order. I don't think we want to "table" the motion for
6 reconsideration. I think you want to make the motion for
7 reconsideration.

8 COMMISSIONER COLEMAN: Okay. So that just
9 postpones it?

10 COMMISSIONER BROAD: That means that the action
11 that we took is reconsidered, whether -- if we take no
12 further action, the matter is concluded --

13 COMMISSIONER COLEMAN: Okay.

14 COMMISSIONER BROAD: -- from the Commission's
15 point of view. Is that correct?

16 COMMISSIONER DOMBROWSKI: Correct.

17 COMMISSIONER COLEMAN: Okay. So that's the
18 motion for reconsideration.

19 COMMISSIONER DOMBROWSKI: Is there a second?

20 COMMISSIONER BROAD: Second.

21 COMMISSIONER DOMBROWSKI: All in favor, say
22 "aye."

23 (Chorus of "ayes")

24 COMMISSIONER DOMBROWSKI: Item Number 9 in your

1 packets, there's a reference to further review of the
2 wages, hours, and conditions of labor and employment of
3 the stable employees in the horseracing industry. We
4 received a letter, basically from the industry,
5 requesting that we do not pursue their exemption.

6 Mr. Davenport?

7 MR. DAVENPORT: Mr. Chairman, Allen Davenport,
8 representing the Service Employees. You also received a
9 letter from us supporting the exemption. We'd like to
10 withdraw that letter.

11 COMMISSIONER DOMBROWSKI: Okay. I can
12 understand that.

13 Do we need to take any action on this?

14 COMMISSIONER BROAD: Well, Mr. Chair, I would
15 move that we close our investigation of this matter. And
16 by way of explanation, that would mean that backstretch
17 employees at racetracks would be covered under Order 10,
18 Amusement and Recreation, as all other employees are at
19 racetracks, and would be subject to the normal daily and
20 weekly overtime provisions established by AB 60.

21 COMMISSIONER DOMBROWSKI: So what do we need --

22 COMMISSIONER BOSCO: Second it.

23 COMMISSIONER DOMBROWSKI: Moved, second, vote.

24 All in favor, say "aye."

1 (Chorus of "ayes")

2 COMMISSIONER DOMBROWSKI: Any other business any
3 of the commissioners want to raise?

4 Mr. Abrams?

5 MR. ABRAMS: Mr. Chairman, Jim Abrams, with the
6 California Hotel and Motel Association.

7 The charge that was just approved --

8 MR. BARON: It'll be on the Web.

9 MR. ABRAMS: It is or will be?

10 MR. BARON: No. It will be -- now that it's
11 been approved, it will be put on the Web.

12 MR. ABRAMS: Just a question of process. If, in
13 fact, anybody, whether they are on the wage board or not,
14 has an issue to raise with regard to something that
15 either should be or, arguably, shouldn't be -- I'm more
16 worried about things that might not be in the charge --
17 is that something -- are you going to have the wage board
18 before your June 30th meeting?

19 AUDIENCE MEMBER: Speak into the microphone.

20 COMMISSIONER DOMBROWSKI: Turn the mike on.

21 MR. ABRAMS: I'm sorry. Forgive me.

22 Is it your intent to have the wage board meet
23 before your meeting on June 30th? Because what I'm
24 concerned about --

1 MR. BARON: They won't -- they won't end up
2 meeting before then. You have to have thirty days'
3 notice for a wage board, so --

4 MR. ABRAMS: I would like to recommend that the
5 Commission put on the agenda for June 30th possible
6 consideration of the charge, just to make sure -- for
7 example, I'm -- we were always concerned whether the meal
8 and lodging credits are part of the charge. I haven't
9 seen the charge that you approved, and if -- if adjusting
10 the meal and lodging credits is not in there, as an
11 example, that is something we would like to have added
12 in.

13 COMMISSIONER BROAD: It is.

14 MR. ABRAMS: Okay.

15 COMMISSIONER BROAD: I would -- given the fact
16 that the Commission needs to move forward on this, I
17 would not like to do that, Mr. Abrams. I think that this
18 charge is appropriate. And any matter that you would --
19 employers wish to raise regarding the minimum wage can
20 certainly be raised on this issue.

21 MR. ABRAMS: And if we do so, Mr. Broad, and
22 it's beyond the charge, will the Commission, before it
23 adopts any minimum wage order, be willing to consider
24 issues that are raised outside of the charge?

1 COMMISSIONER BROAD: Speaking only for myself, I
2 would consider any issue you would wish to raise
3 regarding the minimum wage.

4 MR. ABRAMS: If that's the Commission's
5 position, then fine, that's -- I'm happy. If that's not
6 the Commission's position, then not having -- the public
7 has not seen the charge, so --

8 COMMISSIONER BOSCO: We seem to have no shortage
9 of issues that are raised, so I don't -- I can't imagine
10 you being foreclosed on one of them.

11 COMMISSIONER DOMBROWSKI: All right. Can I have
12 a motion to adjourn?

13 MR. HUET: (Not using microphone) I'd like to
14 speak.

15 COMMISSIONER DOMBROWSKI: Oh, I'm sorry. Come
16 up.

17 MR. HUET: My name is Timothy Huet. I'm with
18 the Association of Arizmendi Cooperatives and Rainbow
19 Grocery Cooperative.

20 I guess worker cooperatives have never addressed
21 your assembly before, and we're not really family with
22 lobbying. I just called up and asked how to get on the
23 agenda and how to come speak to you, and I was told if I
24 signed up I'd have five minutes. So, I know you spent a

1 lot of time, but if you'll just bear with me, five
2 minutes.

3 I don't believe this issue has ever come up
4 before you before. I don't know if you are planning to
5 write regulations explaining what is an employee and what
6 is not an employee. That is our big consideration. We
7 are -- when you talk about having employer
8 representatives and employee representatives, we are both
9 the workers and the owners of the business, and we're
10 confused by the statutory scheme and how we fit into it.

11 There is classifications for partners, saying
12 partners, under California law, are not considered to be
13 under the overtime law, although that's not in the
14 regulations; you have to find that in the DLSE manual.
15 Our issue is that most -- is that people who are worker-
16 owners of worker co-ops do not consider themselves to be
17 employees. We only consider the people that have not
18 gotten a vote and have not bought into the business to be
19 employees. So we are only paying overtime for those
20 people who have not become owners of the business at this
21 point.

22 What that puts us under is a great danger that
23 if the state ever finds that that's not the case, that we
24 could be wiped out by the penalties that would be

1 involved, because most of our workers actually schedule
2 themselves. They do not -- we have no supervisors, we
3 have no managers, and thus, overtime doesn't actually
4 work for us. Our workers have voted overwhelmingly that
5 they don't want overtime, because overtime would have the
6 exact opposite effect of what's intended under the
7 statute. The intention of the statute is to discourage
8 people from working long hours. In our case, since
9 people schedule themselves to work, by paying them a
10 premium to work overtime, you would actually be
11 encouraging them to work overtime, encouraging accidents.

12 So we are looking for regulatory guidance from
13 either this body -- and we're also looking to DLSE at the
14 same time -- about what is considered a worker, what is
15 considered an employee.

16 COMMISSIONER BROAD: Mr. Chair?

17 I would suggest that you solicit an opinion from
18 the Division of Labor Standards Enforcement. The Labor
19 Code sets out the definition of "employee" and
20 "employer," and we are bound by that definition, which I
21 think has been the same for many, many years.

22 The question of whether someone loses their
23 employee status because it is an employee-owned
24 enterprise is one that is -- is probably -- raises

1 considerable issues of potential abuse. And, for
2 example, sharecroppers and -- a lot of these issues have
3 been litigated to a considerable degree in California,
4 and it is not something that the Commission would
5 appropriately address by way of regulation without you
6 first posing your question, at the very minimum, to the
7 Labor Commissioner as to what your problem is, what your
8 circumstances are, what is the -- what are the
9 relationships in your particular enterprise.

10 MR. HUET: We are taking that approach as well.
11 Unfortunately, if we do get an opinion letter, it won't
12 be anything anyone else will be able to see, just as the
13 partnership thing is not something you can find in the
14 regulations. So we're taking all avenues, including
15 bringing it up to your board.

16 I understand that it's not something you're
17 necessarily contemplating, but we're taking all avenues
18 too.

19 Thank you for your time.

20 COMMISSIONER DOMBROWSKI: Thank you.

21 Okay. I need a motion to adjourn.

22 COMMISSIONER BROAD: So moved.

23 COMMISSIONER DOMBROWSKI: Second?

24 COMMISSIONER COLEMAN: Second.

1 COMMISSIONER DOMBROWSKI: All in favor, say
2 "aye."

3 (Chorus of "ayes")

4 (Thereupon, at 4:34 p.m., the public
5 hearing was adjourned.)

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CERTIFICATE OF REPORTER/TRANSCRIBER

--o0o--

I, Cynthia M. Judy, a duly designated
transcriber, do hereby declare and certify under penalty
of perjury under the laws of the State of California that
I transcribed the four tapes recorded at the Public
Hearing of the Industrial Welfare Commission, held on May
26, 2000, in Sacramento, California, and that the
foregoing pages constitute a true, accurate, and complete
transcription of the aforementioned tapes, to the best of
my ability.

Dated: June 11, 2000

CYNTHIA M. JUDY

Reporter/Transcriber

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